Supreme Court, U.S.
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In The

Supreme Court of the United States

FERMIN C. PEREZ,

Petitioner,

v.

PIMA COUNTY SUPERIOR COURT CHIEF PROBATION OFFICER DONALD R. STILES, PROBATION OFFICER DAVID HARPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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132 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Mr. Perez's lack of notice of a contested pretrial evidentiary hearing denied him the right to be present and to confront witnesses where trial counsel failed to notify him of the hearing and purported to waive his (*Boykin*) rights to presence and confrontation at the hearing?

Whether the Fifth Amendment right to remain silent was infringed where Mr. Perez invoked his right to counsel following his arrest for DUI, the arresting officer then asked him a question (whether he would consent to a blood test) and the State used his answer (no) against him at trial?

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY LOWER COURTS

Perez v. Pima County Superior, et al., 2002 U.S. App. LEXIS 23315 (9th Cir. November 6, 2002) (memorandum decision)

STATEMENT OF THE BASIS FOR JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Appeal was entered on November 6, 2002. This Petition for Writ of Certiorari is timely filed within 90 days of that date, pursuant to Supreme Court Rule 13. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND FEDERAL PROVISIONS INVOLVED

U.S. CONST. art. V provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . . "

U.S. CONST. amend. VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . . "

U.S. CONST. amend. XIV, § 1, provides in pertinent part:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

On August 29, 1996, an evidentiary hearing on a pretrial motion to dismiss felony DUI charges was held in Mr. Perez's absence. Mr. Perez was absent only because his trial attorney failed to notify him of the hearing. Mr. Perez's case was prejudiced by his absence because the arresting officer testified at the hearing to facts which were not reflected in his report, which were contradicted by the officer's pretrial interview, and which would have been contradicted by Mr. Perez's testimony, had Mr. Perez been present. He was also prejudiced by his absence because his trial attorney was not aware that he spent over an hour in a holding cell before being booked and that he was not, therefore, able to use the phone in booking immediately after his arrest as the officer testified.

On September 21, 1993, at approximately 1:05 a.m. or shortly thereafter, Deputy Todd Green stopped Mr. Perez for speeding near Craycroft Road and Sunrise Drive in Tucson, Arizona. (RT August 29, 1996, p.5-11) Following field sobriety tests, Mr. Perez was placed under arrest at 1:25 a.m. (RT August 29, 1996, p.11) After being advised of his *Miranda* rights, Mr. Perez stated, according to Deputy Green's testimony, "I want an attorney right now, Harold Hyams." He then stated, according to Deputy Green, "I want an attorney before I do any tests right now." (RT August 29, 1996, p.12)

Rather than making arrangements for Mr. Perez to contact an attorney, Deputy Green continued his investigation, inquiring as to whether Mr. Perez would submit to a chemical test. Mr. Perez agreed to take a blood test and, according to Deputy Green's testimony, stated "I want an attorney present while I do the test" while in route to El Dorado Hospital at approximately 1:30 a.m. Deputy Green testified that he advised Mr. Perez "that he was not permitted to have an attorney present during the testing and he could make a call to an attorney." Deputy Green also testified that Mr. Perez "insisted that he have an attorney present at the test." (RT August 29, 1996, p.14) Because Mr. Perez insisted on having an attorney present at the test, and because Deputy Green felt that Mr. Perez did not have the right to have an attorney present, Deputy Green treated Mr. Perez's insistence as a refusal to complete a chemical test. (RT August 29, 1996, p.14)

Deputy Green arrived at the Pima County Jail with Mr. Perez at approximately 1:45 a.m. Mr. Perez was read the Implied Consent Affidavit at the Pima County Jail. Following that reading he stated "I want an attorney present right now." Deputy Green also noted on the affidavit that Mr. Perez "would not do the test without one." (RT August 29, 1996, p.16) Deputy Green testified that he made no arrangements at the Pima County Jail for Mr. Perez to contact an attorney. (RT August 29, 1996, p.16) According to the Pima County Jail booking form, Mr. Perez was ultimately booked by jail personnel at 2:47 a.m. (ROA 292) When asked by counsel for the state whether he had ever offered Mr. Perez an opportunity to make a phone call to an attorney, Deputy Green stated "not while I was at Pre-Trial Services. I honestly don't recall." (RT August 29,

1996, p.19) On redirect by counsel for Mr. Perez, Deputy Green admitted that time had not yet become a problem with respect to a chemical test. At that point Deputy Green claimed that he had offered to allow Mr. Perez to call an attorney but that Mr. Perez wanted to have an attorney present. (RT August 29, 1996, p.21)

Mr. Perez, having not received notice of the evidentiary hearing, was not present at the hearing when Deputy Green made that claim. Had Mr. Perez been present, he would have testified that, at no time, did Deputy Green ever offer to allow him to use the telephone. (ROA at 291; RT March 3, 1997, p.6-7) Upon further cross-examination by counsel for Mr. Perez, Deputy Green was forced to admit that he had not mentioned offering Mr. Perez the opportunity to use the telephone in his police report or in an interview conducted on August 21, 1996. (RT August 29, 1996, p.22) During the interview, when asked what opportunity he had provided Mr. Perez to contact an attorney, Deputy Green replied "Well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, 'I want an attorney before I take any tests of my blood.'" (RT August 29, 1996, p.29)

Mr. Perez was not at the hearing held August 29, 1996, solely because he had not received notice of the hearing. (RT March 3, 1997, p.3) Mr. Perez's calendar for 1996 showed no notation of a hearing on August 29. Mr. Perez and his wife, Betty Perez, both testified that they reviewed their file of documents in this case and found no notice of the August 29 hearing from trial counsel. (RT March 3, 1997, p.3-5, 12)

Mr. Perez raised the federal question of his lack of notice of the pretrial evidentiary hearing, citing federal

authorities, in his February 17, 1997, request for hearing to determine voluntariness of absence from evidentiary hearing, which was denied by minute entry dated March 10, 1997. It was raised on direct appeal in his opening brief filed September 15, 1997, and denied on the merits by memorandum decision dated March 31, 1998. It was presented to the Arizona Supreme Court by Petition for Review filed March 12, 1998. Review was denied by order of the Arizona Supreme Court dated October 14, 1998.

Mr. Perez raised the federal question of his request for an attorney by motion to suppress/dismiss filed August 16, 1996, by motion to reconsider/dismiss filed December 4, 1996, and by motion to vacate judgment filed February 19, 1997. It was denied by the trial court at the evidentiary hearing held August 29, 1996, at the hearing on the motion to reconsider held December 4, 1996, and by minute entry on March 10, 1997. It was raised on direct appeal in the opening brief filed September 15, 1997, and denied on the merits by memorandum decision dated March 31, 1998. It was presented to the Arizona Supreme Court by petition for review filed May 12, 1998. Review was denied October 14, 1998.

ARGUMENT

FIFTH AMENDMENT RIGHT TO BE PRESENT

Trial counsel could no more waive Mr. Perez's presence at a contested pretrial evidentiary hearing held without his knowledge than she could waive his presence at a trial held without his knowledge. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Mr. Perez was not present at the evidentiary hearing held in

this matter on August 29, 1996, solely because he did not receive notice of the hearing date.[1] Because of his involuntary absence from the hearing, Mr. Perez was unable to confront the state's witness, Deputy Green, he was unable to testify to rebut the testimony of Deputy Green and he was unable to assist his trial counsel in further cross-examining Deputy Green.[2]

Mr. Perez's case was prejudiced by his absence because the arresting officer testified at the hearing to facts which were not reflected in his report, which were contradicted by the officer's pretrial interview, and which, had Mr. Perez been present, would have been contradicted by Mr. Perez's testimony. He was also prejudiced by his absence because his trial attorney was not aware that he spent over an hour in a holding cell before being booked and that he was not, therefore, able to use the phone in booking immediately after his arrest as the officer had testified.

Deputy Green offered two critical pieces of testimony which Mr. Perez was unable to confront or to rebut. The

---

[1] Upon substitution into this case at sentencing, undersigned counsel notified the trial judge that previous counsel's file indicated that a letter may have been sent to Mr. Perez. Neither Mr. Perez nor his wife ever received it, however, it is not in the file Mr. Perez and his wife have kept regarding this case, and it is not reflected in Mr. Perez's 1996 calendar. Furthermore, the letter in prior counsel's file did not indicate that there would be witness testimony nor did it indicate that Mr. Perez should be present. (Defense Exhibit "B" 3/3/97.)

[2] The evidentiary hearing addressed, among other issues, *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982) *Kunzler*, 154 Ariz. 568, 744 P.2d 669 (1987) and *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989), which allow a DUI suspect to consult an attorney before deciding whether to take a chemical test.

first was Deputy Green's testimony that Mr. Perez had the opportunity to request one phone call from jail personnel when he was booked into the Pima County Jail. (RT August 29, 1996, p.16) Had Mr. Perez been present at the evidentiary hearing, he would have pointed out to trial counsel that Deputy Green left him at the Pima County jail in a holding cell and it was well over an hour before jail personnel removed him from the holding cell for booking, a fact easily verified by reference to Mr. Perez's booking sheet which shows him being booked into the Pima County Jail.

Furthermore, under Arizona law, both *Kunzler v. Superior Court*, 154 Ariz. 568, 744 P.2d 669 (1987) and *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989), allow the accused to consult an attorney *before* deciding to take a chemical test. By the time Mr. Perez was booked, Deputy Green had advised him of his license suspension for refusal to take a chemical test, completed his paperwork and left the jail. The trial judge obviously was not informed of the fact that the license suspension had already been served and the investigation completed by the time that Mr. Perez was booked as Judge Donfeld commented during argument that Mr. Perez could have elected to take the breath test while at Pre-Trial Services. (RT August 29, 1996, at p.29-30) Had Mr. Perez been advised of the hearing date, he could have pointed this fact out to counsel.

Most damaging to Mr. Perez was Deputy Green's surprise testimony, in Mr. Perez's absence, that he had offered Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p.21) Although Deputy Green quoted Mr. Perez's exact words in requesting an attorney at several points in his police report (RT August 29, 1996,

p.13, 16), Deputy Green never mentioned in his police report offering a phone call to Mr. Perez or Mr. Perez refusing a phone call. (RT August 29, 1996, at p.22) When interviewed by trial counsel, Deputy Green made no mention of offering Mr. Perez a phone call. (RT August 29, 1996, at p.22) In fact, when asked during the interview, "And what opportunity did you provide him to contact this attorney?" Deputy Green replied "Well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, 'I want an attorney before I take any tests of my blood.'" (RT August 29, 1996, at p.29)

During examination by trial counsel, Deputy Green stated that, after the first request for an attorney, what he did next was to ask Mr. Perez if he would submit to a chemical test. (RT August 29, 1996, at p.12) After the next request for an attorney Deputy Green stated that what he did was to tell Mr. Perez that he was not permitted to have an attorney present during the testing. (RT August 29, 1996, at p.14) When questioned by trial counsel as to what opportunities he gave Mr. Perez to contact an attorney, Deputy Green testified he had no opportunity at the scene to let Mr. Perez contact an attorney. (RT August 29, 1996, at p.14) He also testified that, while he was driving past public telephones, he did not stop to let Mr. Perez use the telephone. (RT August 29, 1996, at p.14-15) When the court inquired as to whether Mr. Perez was given the opportunity to call an attorney at the jail, Deputy Green still had no recollection of offering to allow Mr. Perez to call an attorney and stated that the jail personnel would allow one phone call. (RT August 29, 1996, at p.16) During examination by the prosecutor, Deputy Green was asked:

> Q: At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?
>
> A: Not while I was at Pre-Trial Services. I honestly don't recall.

(RT August 29, 1996, at p.19)

Only after trial counsel for Mr. Perez established that Deputy Green was under no time pressure to complete the chemical tests within the two hour window provided by Arizona law and that phone calls would have taken 5 to 10 minutes did Deputy Green suddenly recall offering Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p.21) (Even so, Deputy Green's testimony was that Mr. Perez wanted an attorney present and Deputy Green did not think that Mr. Perez had the right to have an attorney present. Even by Deputy Green's newly recovered memory, Mr. Perez's right to counsel was denied.) Deputy Green subsequently lost his newly recovered memory after the evidentiary hearing, testifying at the first trial that he gave Mr. Perez an opportunity to use the phone only by taking him to jail:

> Q: What opportunity did you give him at any time to contact an attorney?
>
> A: I informed him that phones were available at pretrial services for him to make a phone call if pretrial would allow that.

(RT September 6, 1996, p.72)

Given the previous inconsistencies in Deputy Green's testimony, reports and interview, given the sudden motive to fabricate upon being pinned down as to the lack of any time pressure, and given Deputy Green's failure to recollect

the crucial issue during his interview or in his police report, Deputy Green's deception of Judge Donfeld is readily apparent. Had Mr. Perez been present at the evidentiary hearing, Mr. Perez would have testified that, at no point, did Deputy Green ever offer him the opportunity to make a phone call. (RT March 3, 1996, p.6-7)

The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but is also protected by the due process clause even in situations where the defendant is not actually confronting witnesses or evidence against him. *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934) (defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge"). Mr. Perez was deprived both of the opportunity to confront Deputy Green and of the opportunity to assist his attorney in cross-examining Deputy Green.

The right of a defendant charged with a felony to be personally present in the courtroom at every stage of his trial is fundamental to our system of justice. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892). This principle has been constantly upheld and continually reaffirmed. *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed.2d 353 (1970). While a criminal defendant may waive his right to be present through his affirmative conduct (*Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)), his right to be present and to confront witnesses is not a right that his attorney could waive for him

even if he were standing there. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) ("We cannot presume a waiver of these three important rights [including the right to confront one's accusers] from a silent record"); *United States v. Novaton*, 271 F.3d 968, 1000 (11th Cir. 2001) ("Although presence of counsel is certainly a relevant factor to be considered in determining whether a defendant's absence was harmless, the right to be present at trial – grounded in the Confrontation Clause and the Due Process Clause – is not a gossamer right inevitably swept away simply because a defendant is represented, in his absence, by counsel. The right to be present is distinct from the right to be represented by counsel. The right to be present would be hollow indeed if it was dependent upon the lack of representation by counsel. Furthermore, such a rule would ignore the fact that a client's active assistance at trial may be key to an attorney's effective representation of his interests.").

Moreover the questions regarding deprivation of the right to counsel that were asked at the evidentiary hearing were *not* the type of questions that would be repeated on cross-examination at trial as they were relevant to a motion to suppress/dismiss rather than to guilt or innocence. *See*, *Kentucky v. Stincer*, 482 U.S. 730, 741, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). The right to be present at every stage of trial is protected by the due process and confrontation clauses of the Fifth and Sixth amendments to the United States Constitution.

FIFTH AMENDMENT RIGHT TO REMAIN SILENT/RIGHT TO ASSISTANCE OF COUNSEL DURING QUESTIONING

Mr. Perez was arrested for DUI, he invoked his right to counsel, he was questioned (about his willingness to submit to a blood test) and his answer (no) was introduced against him at trial.[3] Immediately after having been told, through the reading of his *Miranda* rights, that he had the right to the presence of an attorney before answering any further questions, Mr. Perez invoked his right to counsel, expressing "his desire to deal with the police only through counsel." *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Rather than honoring his request, the arresting officer questioned Mr. Perez as to his willingness to consent to a blood test. The state then introduced Mr. Perez's incriminating response, his refusal to submit to a blood test, at trial as evidence of his consciousness of guilt.[4]

Although the Ninth Circuit panel indicated with respect to this argument in its memorandum opinion that "At oral argument, Petitioner attempted to raise additional Constitutional claims", Mr. Perez has relied upon *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982), and its predecessor, *People v. Gursey*, 22 N.Y.2d 224, 239 N.E.2d 351 (1968), at every step in the proceedings in

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[3] Arizona law gives a DUI suspect the option of rejecting a chemical test and receiving a 1-year license suspension instead. A.R.S. § 28-1321.

[4] *Rhode Island v. Innis*, 446 U.S. 291, 301, n.5 (1980) ("By 'incriminating response' we refer to any response – whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial.")

Arizona and Federal courts. *People v. Gursey*, in turn, is based upon the holdings in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

Dated February 4, 2003.

Respectfully submitted,

S. JONATHAN YOUNG
LAW OFFICES OF WILLIAMSON & YOUNG, P.C.
Attorney for Petitioner

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERMIN C. PEREZ, Petitioner-Appellant, v. PIMA COUNTY SUPERIOR, ET AL., Respondents-Appellees.	No. 01-17272 D.C. No. CV-99-522-TUC-WDB MEMORANDUM* (Filed Nov. 6, 2002)

Appeal from the United States District Court
for the District of Arizona
William D. Browning, Senior District Judge, Presiding

Argued and Submitted October 11, 2002
San Francisco, California

Before: BALDOCK,** KLEINFELD, and RAWLINSON, Circuit Judges.

Petitioner Fermin C. Perez appeals the district court's order denying his petition for a writ of habeus corpus following his state court conviction of one count of aggravated driving under the influence of intoxicating liquor

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** Honorable Bobby R. Baldock, Circuit Judge for the United States Court of Appeals for the Tenth Circuit, sitting by designation.

(DUI). *See* 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253. We affirm.

I.

On September 21, 1993, a Pima County deputy sheriff stopped Petitioner for speeding. Following field sobriety tests, the deputy placed Petitioner under arrest and advised him of his *Miranda* rights. Petitioner immediately requested an attorney. When asked if he would submit to a chemical sobriety test, Petitioner replied that he would take a blood test but wanted an attorney present during the test. The deputy informed Petitioner that he did not have the right to have an attorney present during the test, but could telephone an attorney. Petitioner continued to insist on having his attorney present for the blood test. Interpreting Petitioner's insistence as a refusal to submit to the test, the deputy transported Petitioner to the Pima County Jail and read Petitioner the Arizona Implied Consent affidavit. The affidavit informed Petitioner of the deputy's right to conduct chemical testing and the consequences, under Arizona law, of Petitioner's refusal to submit to testing. Petitioner continued to insist on having his attorney present.

An Arizona jury subsequently convicted Petitioner of one count of aggravated driving under the influence of intoxicating liquor while his license was suspended, revoked, or in violation of a restriction, a class four felony. On direct appeal, Petitioner argued he was denied his Sixth Amendment right to counsel when he was not allowed to have counsel present prior to submitting to a chemical sobriety test. The Arizona Court of Appeals affirmed Petitioner's conviction, and the Arizona Supreme

Court and the United States Supreme Court denied certiorari. Petitioner raised the same claim in his federal habeas petition.[1] The district court denied Petitioner's habeas petition, but granted his request for a certificate of appealability.[2]

We review the district court's decision to deny a § 2254 habeas petition de novo. *Alvarado v. Hill,* 252 F.3d 1066, 1068 (9th Cir. 2001). Petitioner's petition, filed after April 24, 1996, is subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, a petitioner is entitled to relief on a claim adjudicated in the state court only if the petitioner can establish the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based upon an unreasonable determination of facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). We presume state court factual findings are correct, and place the burden on the petitioner to rebut that presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

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[1] Petitioner also raised two additional claims on direct appeal and in his federal habeas petition that are not at issue in this appeal.

[2] At oral argument, Petitioner attempted to raise additional Constitutional claims. The District Court's certificate of appealability was limited to Petitioner's Sixth Amendment claim. Accordingly, this Court does not have jurisdiction over Petitioner's remaining claims. *See* 28 U.S.C. § 2253(c)(1).

II.

The Arizona Court of Appeals concluded that a suspect is not entitled to have an attorney present prior to submitting to a sobriety test. The decision was not contrary to federal law. The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. Const. Amend. VI. The right to counsel attaches only upon the initiation of judicial criminal proceedings against the defendant, or when the government's role otherwise shifts from investigation to accusation. *See United States v. Hayes,* 231 F.3d 663, 667 (9th Cir. 2000) (en banc) (citing *United States v. Gouveia,* 467 U.S. 180, 189 (1984)). In the present case, state officials had not brought formal charges against Petitioner. The deputy's request that Petitioner submit to a sobriety test is merely investigatory. *See Schmerber v. California,* 384 U.S. 757, 761 (1966). Accordingly, Petitioner's Sixth Amendment right to counsel had not yet attached. *See Roberts v. Maine,* 48 F.3d 1287, 1290-91 (1st Cir. 1995) (rejecting argument that a suspect's right to counsel attaches prior to submitting to a sobriety test); *McVeigh v. Smith,* 872 F.2d 725, 727-28 (6th Cir. 1989) (same); *Langelier v. Coleman,* 861 F.2d 1508, 1510 n.3 (11th Cir. 1988) (same); *see also Nyflot v. Minnesota Comm'r of Public Safety,* 474 U.S. 1027 (1985) (dismissing for lack of a substantial federal question Appellant's claim that her Constitutional rights were violated when she was refused counsel prior to submitting to a sobriety test).

The Arizona Supreme Court has held that due process guarantees a criminal suspect a reasonable opportunity to consult with counsel, in person or by telephone, prior to submitting to a blood test if such access would not unduly

delay the investigation and arrest. *See Kunzler v. Pima County Superior Court,* 744 P.2d 669, 672 (1987). This right is based on Arizona Rule of Criminal Procedure 6.1 which, although based on the federal right to counsel, provides more expansive rights.[3] Petitioner does not have a federal right to consult with counsel prior to submitting to a chemical sobriety test, or a federal right to have counsel physically present during the test.

Accordingly, the district court order denying habeas relief is AFFIRMED.

[3] Under Rule 6.1, the right to counsel attaches "as soon as feasible after a defendant is taken into custody. . . ."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERMIN C. PEREZ, Petitioner-Appellant, v. PIMA COUNTY SUPERIOR COURT; JANET NAPOLITANO, Respondents-Appellees.	No. 01-17272 D.C. No. CV-99-00522-WDB Arizona (Tucson) ORDER (Filed Dec. 26, 2001)

Before: TROTT and PAEZ, Circuit Judges

The request for an expanded certificate of appealability, filed on November 26, 2001, is denied. *See* 28 U.S.C. § 2253(c)(2).

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERMIN C. PEREZ, Appellant/Petitioner, -VS.- PIMA COUNTY SUPERIOR COURT, ET AL, Appellees/Respondent	D.C. No. CV-99-522-TUC-WDB MOTION TO BROADEN CERTIFICATE OF APPEALABILITY

Appellant, Fermin C. Perez, through his attorney, S. Jonathan Young, hereby moves this Court, pursuant to FRAP 22 and Circuit Rule 22-1 to broaden the certificate of appealability to include Mr. Perez's allegation that he was denied the right to be present when a contested evidentiary suppression hearing was held with no actual notice to him.

Dated November 19, 2001

/s/ S. Jonathan Young
S. Jonathan Young
LAW OFFICES OF WILLIAMSON & YOUNG, P.C.
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

On August 29, 1996, an evidentiary hearing on a pretrial motion to dismiss felony DUI charges was held in Mr. Perez's absence. Mr. Perez was absent only because his trial attorney failed to notify him of the hearing. Mr. Perez's case was prejudiced by his absence because the arresting officer testified at the hearing to facts which were not reflected in his report, which were contradicted by the officer's pretrial interview, and which, had Mr. Perez been present, would have been contradicted by Mr. Perez's testimony. He was also prejudiced by his absence because his trial attorney was not aware that he spent over an hour in a holding cell before being booked and that he was not, therefore, able to use the phone in booking immediately after his arrest as the officer had testified.

At the hearing, the arresting officer claimed that he had offered to allow Mr. Perez to call an attorney but that Mr. Perez wanted to have an attorney present. (RT August 29, 1996, p. 21.) Mr. Perez, having not received notice of the evidentiary hearing, was not present at the hearing when Deputy Green made that claim. Had Mr. Perez been present, he would have testified that, at no time, did Deputy Greene ever offer to allow him to use the telephone. (ROA at 291; RT March 3, 1997, p. 6-7). Upon further cross-examination by counsel for Mr. Perez, Deputy Greene was forced to admit that he had not mentioned offering Mr. Perez the opportunity to use the telephone in his police report or in an interview conducted on August 21, 1996. (RT August 29, 1996, p. 22.) During the interview, when asked what opportunity he had provided Mr. Perez to contact an attorney, Deputy Greene replied "well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want

an attorney before I take any tests of my blood." (RT August 29, 1996, p. 29.)

Mr. Perez was not at the hearing held August 29, 1996, solely because he had not received notice of the hearing. (RT March 3, 1997, p. 3.) Mr. Perez's calendar for 1996 showed no notation of a hearing on August 29. Mr. Perez and his wife, Betty Perez, both testified that they reviewed their file of documents in this case and found no notice of the August 29 hearing from trial counsel. (RT March 3, 1997, p. 3-5, 12.)

Mr. Perez raised the federal question of his lack of notice of the pretrial evidentiary hearing, citing federal authorities, in his February 17, 1997, request for hearing to determine voluntariness of absence from evidentiary hearing (Appendix to Petition, Exhibit VIII), which was denied by minute entry dated March 10, 1997. (Appendix to Petition, Exhibit VI.) It was raised on direct appeal in his opening brief filed September 15, 1997 (Appendix to Petition, Exhibit IV), and denied on the merits by memorandum decision dated March 31, 1998. (Appendix to Petition, Exhibit III.) It was presented to the Arizona Supreme Court by Petition for review filed March 12, 1998. (Appendix to Petition, Exhibit II.) Review was denied by order of the Arizona Supreme Court dated October 14, 1998 (Appendix to Petition, Exhibit I.)

MR. PEREZ'S LACK OF NOTICE OF THE PRETRIAL EVIDENTIARY HEARING IN THIS CASE DENIED MR. PEREZ THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, DENIED MR. PEREZ HIS DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AND DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Mr. Perez was not present at the evidentiary hearing held in this matter on August 29, 1996, solely because he did not receive notice of the hearing date.[1] Because of his involuntary absence from the hearing, Mr. Perez was unable to confront the witness, Deputy Green, he was unable to rebut the testimony of Officer Green and was unable to assist his trial counsel in further cross-examining Deputy Green.

Deputy Green offered two critical pieces of testimony which Mr. Perez was unable to confront or to rebut. The first was Deputy Green's testimony that Mr. Perez had the opportunity to request one phone call from jail personnel when he was booked into the Pima County Jail. (RT August 29, 1996, p. 16.) Had Mr. Perez been present at the evidentiary hearing, he would have pointed out to trial counsel that Deputy Green left him at he Pima County jail

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[1] While a letter may have been sent to Mr. Perez, neither he nor his wife ever received it, it is not in the file he and his wife have kept, and it is not reflected in his 1996 calendar. Furthermore, the letter does not indicate that there will be witness testimony nor does it indicate that Mr. Perez should be present. (Defense Exhibit "B" 3/3/97.) That Mr. Perez's attorney received notice of the hearing is, however, irrelevant as the defendant himself must waive his presence, either personally or through his actions. *Shewfelt v. Alaska, 228 F.3d 1088 (9th Cir. 2000)*; *Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995)*; *United States v. Kupau, 781 F.2d 740 (9th Cir. 1986).*

I a holding cell and it was well over an hour before jail personnel removed him from the holding cell for booking, a fact easily verified by reference to Mr. Perez's booking sheet which shows him being booked into the Pima County Jail *at 2:47 a.m.*

Furthermore, both *Kunzler*, 154 Ariz. 568, 744 P.2d 669 (1987) and *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989), allow the accused to consult an attorney *before* deciding to take a chemical test. By the time Mr. Perez was booked, Deputy Green had advised him of his license suspension for refusal to take a chemical test, completed his paperwork and left the jail. Judge Donfeld obviously was not informed that the license suspension had already been served and the investigation completed by the time that Mr. Perez was booked as Judge Donfeld commented during argument that Mr. Perez could have elected the breath test while at Pre-Trial Services. (RT August 29, 1996, at p. 29-30.) Had Mr. Perez been advised of the hearing date, he could have pointed this fat out to counsel.

Most damaging to Mr. Perez was Deputy Green's surprise testimony, in Mr. Perez's absence, that he had offered Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) Although Deputy Green quoted Mr. Perez's exact words in requesting an attorney at several points in his police report (RT August 29, 1996, p. 13, 16.), Deputy Green never mentioned in his police report offering a phone call to Mr. Perez or Mr. Perez refusing a phone call. (RT August 29, 1996, at p. 22.) When interviewed by trial counsel, Deputy Green made no mention of offering Mr. Perez a phone call. (RT August 29, 1996, at p. 22.) In fact, when asked during the interview "and what opportunity did you provide him to contact this attorney?" Deputy Green replied "Well, at that point, I

took him to jail because he said earlier while we were in the vehicle, he said, I wan an attorney before I take any tests of my blood." (RT August 29, 1996, at p. 29.)

During examination by trial counsel, Deputy Green stated that, after the first request for an attorney, what he did next was to ask Mr. Perez if he would submit to a chemical test. (RT August 29, 1996, at p. 12.) After the next request for an attorney Deputy Green stated tat what he did was to tell Mr. Perez that he was not permitted to have an attorney present during the testing. (RT August 29, 1996, at p. 14.) When questioned by trial counsel as to what opportunities he gave Mr. Perez to contact an attorney, Officer Green testified he had no opportunity at the scene to let Mr. Perez contact an attorney. (RT August 29, 1996, at p. 14.) He also testified that, while he was driving past public telephones, he did not stop to let Mr. Perez use the telephone. (RT August 29, 1996, at p. 14-15.) When the court inquired as to whether Mr. Perez was given the opportunity to call an attorney at the jail, Deputy Green still had no recollection of offering to allow Mr. Perez to cal an attorney and stated that the jail personnel would allow one phone call. (RT August 29, 1996, at p. 16.) During examination by the prosecutor, Deputy Green was asked:

> Q: At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?
>
> A: Not while I was at Pre-Trial Services. I honestly don't recall.

(RT August 29, 1996, at p. 19.)

After the trial counsel for Mr. Perez established that Deputy Green was under no time pressure to complete the chemical tests within 2 hours and phone calls would have

taken 5 to 10 minutes that Deputy Green suddenly recalled offering Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) (Even so, Deputy Green's testimony was that Mr. Perez wanted an attorney present and Deputy Green did not think that Mr. Perez had the right to have an attorney present. Even by Deputy Green's newly recovered memory, Mr. Perez's right to counsel was denied.) Deputy green subsequently lost his newly recovered memory after the evidentiary hearing, testifying at the first trial that he gave Mr. Perez an opportunity to use the phone only by taking him to jail:

> Q: What opportunity did you give him at any time to contact an attorney?
>
> A: I informed him that phones were available at pretrial services for him to make a phone call if pretrial would allow that.

(RT. September 6, 1996, p. 72)

Given the previous inconsistencies in Deputy Green's testimony, reports and interview, given the sudden motive to fabricate upon being pinned down as to the lack of any time pressure, and given deputy Green's failure to recollect the crucial issue during his interview or in his police report, Deputy Green's deception of Judge Donfeld is readily apparent. Had Mr. Perez been present at the evidentiary hearing, Mr. Perez would have testified that, at no point, did Deputy Green ever offer him the opportunity to make a phone call. (R.T. March 3, 1996, p. 6-7.)

The right of a defendant charged with a felony to be personally present in the courtroom at every stage of his trial conducted is fundamental to our system of justice. 'A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be

done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892). This principle has been constantly upheld and continually reaffirmed. *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed.2d 353 (1970); *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 26, 58, 96 L.Ed.2d 631 (1987). The right to be present at every stage of trial is protected by the due process and confrontation clauses of the Fifth and Sixth amendments to the United States Constitution.

Dated November 1, 2001.

/s/ S. Jonathan Young
S. Jonathan Young
Attorney for Defendant/Appellant

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FERMIN C. PEREZ, Petitioner, vs. PIMA COUNTY SUPERIOR COURT, et al., Respondents.	Case No.: CIV 99-522-TUC-WDB NOTICE OF APPEAL/REQUEST FOR CERTIFICATE OF APPEALABILITY (Filed Oct. 25, 2001)

The Petitioner, Fermin C. Perez, by and through his attorney, Jon Young, hereby notices his appeal of this courts final order field October 16, 2001, and further requests that this court issue a certificate of appealability both as to the issue of Mr. Perez's right to be present at every stage of the trial court proceedings and as to the issue of Mr. Perez's right to consult with an attorney, not just telephonically, but also in person. Mr. Perez incorporates, by reference the facts and arguments as briefed in his Petition for Habeas Corpus, the Supporting Memorandum, and the Appendix.

Mr. Perez received no actual notice of the pretrial motions hearing on the violation, at the time of his arrest, of his right to the presence of an attorney. No evidence

was presented to the contrary. That his attorney received notice of the hearing and appeared is irrelevant, the defendant must personally waive his presence.[1]

A defendant has the right to the *presence* of an attorney prior to questioning. *Miranda v. Arizona,* 384 U.S. 436 (1966). Having invoked and been denied that right, Mr. Perez was not subject to further interrogation. Inquiry as to whether Mr. Perez was willing to consent to a search (of his breath) constitutes further interrogation.[2] Breath,

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[1] *Shewfelt v. Alaska,* 228 F.3d 1088 (9th Cir. 2000); *Turner v. Marshall,* 63 F.3d 807 (9th Cir. 1995); *United States v. Kupau,* 781 F.2d 740 (9th Cir. 1986).

[2] *Desales v. Woo,* 860 F.Supp. 1436, 1445 N.7 (N.D. Cal. 1994) ("the court notes that, in asking plaintiff for consent to search after he had invoked his *Miranda* rights, defendant's [police officers] may also have violated plaintiff's Sixth Amendment right to counsel under *Massiah.*") In *United States ex. rel. Daley v. Yeager,* 415 F.2d 779 (3rd Cir. 1969), the court found that consent obtained from a defendant to search his apartment after he had invoked his *Miranda* rights violated his Sixth Amendment rights under *Massiah.* The Eighth Circuit came to a similar conclusion in *Hall v. State of Iowa,* 705 F.2d 283, 290 (8th Cir. 1983). *United States v. Taft,* 769 F.Supp. 1295, 1305 (1991) ("All of the evidence obtained from the consent search was gained through the exploitation of a Fifth Amendment violation and therefore should be suppressed."); *United States v. Yan,* 704 F.Supp. 1207, 1211-12 (S.D.N.Y. 1988) (rational of *Edwards* broad enough to include "interrogation" about whether the accused will consent to a warrantless search.); *United States v. Rojas,* 655 F.Supp. 1156, 1168 (E.D.N.Y. 1987) (evidence found as a result of oral consent to search suppressed because the consent was product of questioning in violation of defendant's exercising his rights under *Miranda* to remain silent.); *People v. Johnson,* 48 N.Y.2d 565, 399 N.E.2d 936 (1979) (consent to search held legally ineffective, even though found to be voluntarily given, because it was unconstitutionally obtained after request for attorney was not granted.).

blood and urine testing all constitute searches.[3] Once Mr. Perez requested the physical presence of an attorney, the State was not entitled to limit Mr. Perez contact to telephonic contact with an attorney.

As both issues are well supported factually and well grounded in constitutional law, the petitioner requests that a certificate of appealability issue based on his substantial showing of the denial of constitutional rights.

Dated October 25, 2001

/s/ [Illegible]
S. Jonathan Young
LAW OFFICES OF WILLIAMSON & YOUNG, P.C.
Attorney for Defendant

Copies of the foregoing
mailed/delivered October 25, 2001, to:

United States District Court
Clerk-Criminal Desk
U.S. Courthouse
405 W. Congress Street
Tucson, AZ 85701

DONNA J. LAM
Assistant Attorney General
Criminal Appeals Section
400 W. Congress, S-315
Tucson, AZ 85701-1367

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[3] *Skinner v. Railway Executives Association*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Fermin C. Perez, Petitioner, vs. Terry L. Stewart, et al., Respondents.	JUDGMENT IN A CIVIL CASE Case No. CV-99-522-TUC-WDB (Filed Oct. 16, 2001)

DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Petitioner's Amended Application for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is DENIED.

IT IS FURTHER ORDERED that this case is DISMISSED.

October 16, 2001
Date

RICHARD H. WEARE
CLERK

/s/ Cathy Schwader
(By) Cathy Schwader,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FERMIN C. PEREZ, Petitioner, vs. PIMA COUNTY SUPERIOR COURT, et al., Respondent.	No. CIV 99-522-TUC-WDB **ORDER** (Filed Oct. 31, 2001)

Pending before the Court is Petitioner's Notice of Appeal/Request for Certificate of Appealability pursuant to 28 U.S.C. § 2253(c). Petitioner previously filed an application for Writ of Habeas corpus pursuant to 28 U.S.C. § 2254. The application was denied.

Before Petitioner can appeal this Court's Order, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c); Fed.R.app.P. 22(b). Federal Rules of Appellate Procedure, Rule 22(b), requires the district court who rendered a judgment denying the petition made pursuant to 28 U.S.C. § 2254 to "either issue a certificate of probable cause or state the reasons why such a certificate should not issue." Additionally, 28 U.S.C. § 2253(c)(2) provides that a certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." In the certificate, the court must indicate which specific issues satisfy this showing. *See* 28 U.S.C. § 2253(c).

I. FACTUAL AND PROCEDURAL BACKGROUND

In September 1993, Petitioner was stopped by Deputy Greene after having sped through a red light. Following

field sobriety tests, Petitioner was placed under arrest. After having been read his *Miranda* rights, Petitioner asked for an attorney before he would consent to a blood alcohol test. Deputy Greene testified that Petitioner wanted to have an attorney present, at 1:30 a.m., while the blood was drawn. The deputy testified that he told Petitioner that he could not have the attorney present, but that he could call his attorney.

Rather than go on to the hospital for the test, deputy Greene brought Petitioner to the Prima County Jail. After having been read the Implied Consent Affidavit, Petitioner again requested that his attorney be present. Deputy Greene testified that he offered to allow Petitioner to call an attorney.

This testimony was developed at an evidentiary hearing that Petitioner claims he was not given notice of. His attorney was present for the hearing and cross-examined Deputy Greene extensively on the changes in his statements. Petitioner claims, however, that Deputy Greene never offered to allow him to use the telephone to call an attorney.

Petitioner was found guilty on March 26, 1996, of one count of aggravated driving under the influence while his license was suspended, revoked, or in violation of a restriction, a class 4 felony. The court placed Petitioner on probation for ten years. A 6-month jail sentence and mandatory 4-month prison sentence were suspended, pending resolution of Petitioner's direct appeal.

Petitioner filed his direct appeal on April 11, 1997, making three claims of error: (1) lack of notice of the pretrial evidentiary hearing deprived Petitioner of the right to confront witnesses against him and denied his due

process right to be present at all stages of the proceeding; (2) ineffective assistance of counsel; and (3) denial of Petitioner's right to consult with counsel by telephone or in person prior to submitting to a chemical test. The Arizona Court of Appeals affirmed Petitioner's conviction holding that claims 1 and 3 were without merit and that the ineffective assistance of counsel claim needed to be addressed in a Rule 32 post-conviction review proceeding.

Petitioner never filed a Rule 32 petition. Instead he filed a petition for review with the Arizona Supreme Court, which was summarily denied. The mandate issued on November 27, 1998. Petitioner then filed a Petition for Certiorari with the United States Supreme Court. Petitioner brought two issues: (1) whether his conviction should be reversed on appeal based on the arresting officer's denial of Petitioner's right to consult with counsel in person; and (2) whether the evidentiary hearing denied Petitioner the right to confront witnesses, denied him his due process right to be present at all stages, and denied him effective assistance of counsel. The Supreme Court denied certiorari on January 25, 1999.

This petition was filed on October 19, 1999. An amended petition was filed on November 18, 1999. This Court found that Petitioner's claims, denial of counsel at the time of arrest and the due process claim, were without merit, because the trial court had determined that the officer had given Petitioner an opportunity to call his attorney and his attorney could waive his presence at the evidentiary hearing.

II. CERTIFICATE OF APPEALABILITY

While it is settled law that an attorney may waive his client's presence at a hearing when the client is voluntarily absent, whether the State is required to allow a defendant actual access to his attorney prior to chemical tests is not. Although the denial of a writ of certiorari by the Supreme Court suggests that this is not so, the Court will grant the Petitioner a Writ of Appealability on this issue. Accordingly,

IT IS HEREBY **ORDERED** that a Certificate of Appealability is **GRANTED** on the issue of whether it was a denial of Petitioner's Sixth Amendment rights to not allow him to have his attorney physically present before chemical testing.

DATED this 29 day of October, 2001.

/s/ William D. Browning
William D. Browning
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FERMIN C. PEREZ, Petitioner, vs. TERRY L. STEWART, et al., Respondents.	No. CIV 99-522-TUC-WDB **ORDER** (Filed Oct. 16, 2001)

Pending before the Court is Petitioner's amended application for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner has made two claims for relief: (1) Petitioner was denied his rights under the Confrontation Clause when he was not given notice of a pretrial evidentiary hearing; (2) Petitioner was denied his Sixth Amendment right to counsel when he was not permitted to consult an attorney prior to submitting to blood alcohol testing. Petitioner's application must be **DENIED** for the following reasons.

I. FACTUAL AND PROCEDURAL BACKGROUND

In September 1993, Petitioner was stopped by Deputy Greene after having sped through a red light. Following filed sobriety tests, Petitioner was placed under arrest. After having been read his *Miranda* rights, Petitioner asked for an attorney before he would consent to a blood alcohol test. Deputy Greene testified that Petitioner wanted to have an attorney present, at 1:30 a.m., while the blood was drawn. The deputy testified that he told Petitioner that he could not have the attorney present, but that he could call his attorney.

Rather than go on to the hospital for the test because he believed Petitioner would not consent without the attorney present, Deputy Greene brought Petitioner to the Pima County Jail. After having been read the Implied Consent Affidavit, Petitioner again requested that his attorney be present. Deputy Greene testified that he offered to allow Petitioner to call an attorney.

This testimony was developed at an evidentiary hearing that Petitioner claims he was not given notice of. His attorney was present for the hearing and cross-examined Deputy Greene extensively on the changes in his statements. Petitioner claims, however, that Deputy Greene never offered to allow him to use the telephone to call an attorney.

Petitioner was found guilty on March 26, 1996, of one count of aggravated driving under the influence while his license was suspended, revoked, or in violation of a restriction, a class 4 felony. The court placed Petitioner on probation for ten years. A 6-month jail sentence and mandatory 4-month prison sentence were suspended, pending resolution of Petitioner's direct appeal.

Petitioner filed his direct appeal on April 11, 1997, making three claims of error: (1) lack of notice of the pretrial evidentiary hearing deprived Petitioner of the right to confront witnesses against him and denied his due process right to be present at all stages of the proceeding; (2) ineffective assistance of counsel; and (3) denial of Petitioner's right to consult with counsel by telephone or in person prior to submitting to a chemical test. The Arizona Court of Appeals affirmed Petitioner's conviction, holding that claims 1 and 3 were without merit and that

the ineffective assistance of counsel claim needed to be addressed in a Rule 32 post-conviction review proceeding.

Petitioner never filed a Rule 32 petition. Instead he filed a petition for review with the Arizona Supreme Court, which was summarily denied. The mandate issued on November 27, 1998. Petitioner then filed a Petition for Certiorari with the United States Supreme Court. Petitioner brought two issues: (1) whether his conviction should be reversed on appeal based on the arresting officer's denial of Petitioner's right to consult with counsel in person; and (2) whether the evidentiary hearing denied Petitioner the right to confront witnesses denied him his due process right to be present at all stages, and denied him effective assistance of counsel. The Supreme Court denied certiorari on January 25, 1999.

This petition was filed on October 19, 1999. An amended petition was filed on November 18, 1999.

II. STATUTE OF LIMITATIONS AND EXHAUSTION

Petitioner's claims were brought within one year of the completion of direct review and the time in which his conviction became final, and, thus, are timely. Both claims were brought and fully briefed before the State courts. Petitioner has not brought his ineffective assistance of counsel claim that was not exhaustion. Both claims are properly before this Court.

III. DISCUSSION

A. Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), habeas relief may only be granted when the state court's decision was (1) contrary to clearly established Federal law or involved an unreasonable application of that law, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. "The Act limits the ability of federal courts to reexamine questions of law and mixed questions of law and fact." *Jeffries v. Wood*, 114 F.3d 1484, 1498 (9th Cir. 1997). Deference to state court factual findings is appropriate. *Id.*

B. Presence at the Evidentiary Hearing

Petitioner argues that his rights to confront the witnesses against him and to be present at all stages of the proceedings were violated when he did not receive notice of an evidentiary hearing and the proceedings went on without him. The evidentiary hearing was held be the trial court to determine whether Petitioner's right to counsel had been violated.

The Arizona Court of Appeals held that the right to be present at any proceeding is waivable by being voluntarily absent, that defense counsel waived Petitioners presence, and that waiver was binding on him. Additionally, the court of appeals found that Petitioner only claimed that he did not receive his counsel's letter informing him of the hearing, rather than that it had never been sent. The court of appeals found that on this record it could not find

that the trial court abused its discretion in proceeding in Petitioner's absence or refusing to hold another hearing.

Although the right to be present at trial and other proceedings is "an ancient and well-established one which draws on . . . the due process clause and the confrontation clause," a defendant's presence may be waived by a voluntary absence. *See Badger v. Cardwell,* 587 F.2d 968, 970 (9th Cir. 1978). Where the defendant never informed the court that he wanted to be present at all proceedings and his counsel did not object to his absence, we may presume voluntary waiver. *See United States v. Rewald,* 889 F.2d 836, 854 (9th Cir. 1989); *see also United States v. Gagnon,* 470 U.S. 522, 528 (1985) (trial court "need not get an express 'on the record' waiver from the defendant for every trial conference which a defendant may have a right to attend"); *United States v. Martinez,* 883 F.2d 750 (9th Cir. 1989) (court may infer waiver of defendant's right to testify and court has no obligation to inquire into whether the defendant knowingly and intelligently waived this right).

Moreover, there is no evidence that Petitioner was prejudiced by his absence. Petitioner has argued that he would have testified that Deputy Greene never offered him an opportunity to call an attorney. However, Petitioner's attorney cross-examined the deputy extensively on this point, bringing up differences in the deputy's testimony. Essentially, the question came done to the credibility of the officer, once counsel established the disputed facts. The trial court chose to accept the deputy's version. The Court cannot say that Petitioner's testimony would have affected this decision.

The State court of appeals analyzed this issue as it would have been under federal law. Accordingly, the Court cannot say that the State courts' decision was either contrary to clearly established federal law or an unreasonable application of the law to the facts. No relief is available on these grounds.

C. Denial of Counsel

Petitioner argues that he was denied the opportunity to consult with counsel before submitting to chemical tests. As noted above, an evidentiary hearing was held on this point by the trial court in which the arresting officer testified that while he told Petitioner that he could not have an attorney present at the time of the test, he could call an attorney prior to the tests. Applying Arizona law, the court of appeals held that Petitioner did not have a right to have an attorney physically present, although he was entitled to confer with counsel either in person or by telephone. "It is the consultation with counsel that is important, not counsel's physical presence at the scene. The trial court did not err in finding that Perez was not denied his right to counsel."

All parties agree that Petitioner was entitled to confer with counsel, and the trial court found that he was offered an opportunity to consult with counsel. This Court defers to the trial court's finding of fact. Thus, the only remaining issue is whether Petitioner was entitled to have counsel present at the time blood was drawn or other chemical tests were performed. Petitioner has failed to offer any federal authority for this proposition and the Court is unaware of any. Given that the Supreme Court denied certiorari on this issue, the Court cannot say that the

State court of appeals' decision, based on state law, violated any clearly established federal law. No relief is available on this claim.

IV. CONCLUSION

Accordingly,

IT IS HEREBY **ORDERED** that Petitioner's amended application for Writ of Habeas Corpus is **DENIED**.

DATED this 15 day of October, 2001.

/s/ William D. Browning
William D. Browning
Senior United States
District Judge

[SEAL]

Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 342-9306

NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

October 14, 1998

RE: STATE OF ARIZONA vs. FERMIN C. PEREZ aka FERNANDO PEREZ
Supreme Court No. CR-98-0244-PR
Court of Appeals No. 2 CA-CR 97-0185
Pima County NO. CR-52507

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 8, 1998, in regard to the above-referenced cause:

ORDERED: Petition for Review by the Supreme Court – DENIED.

A panel composed of Vice Chief Justice Jones, Justice Martone, and Justice McGregor participated in the determination of this matter.

Record returned to Court of Appeals, Division Two, Tucson, this 14th day of October, 1998.

NOEL K. DESSAINT, Clerk

TO:
Hon. Grant Woods, Arizona Attorney General
Attn: Paul J. McMurdie, Esq. and Donna J. Lam, Esq.
S. Jonathan Young, Esq.
Fermin C. Perez
Joyce Goldsmith, Clerk, Court of Appeals, Division Two, Tucson
Lexis-Nexis
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, vs. FERMIN C. PEREZ, Petitioner.	) Supreme Court No.:) (Court of Appeals No. 2 CA-CR 97-0185)) (Pima County Superior Court Cause No. CR-52507)) PETITION FOR REVIEW BY THE SUPREME COURT) (Filed May 12, 1998)

The petitioner, Fermin C. Perez, by and through his attorney, S. Jonathan Young, hereby petitions the Arizona Supreme Court for a review of the Court of Appeals's memorandum decision dated March 31, 1998, and order denying reconsideration dated April 30, 1998, affirming Mr. Perez's conviction and the sentence imposed.

I

Synopsis of the Decision of the Court of Appeals

On March 31, 1998, Division 2 of the Court of Appeals filed its memorandum decision in the above entitled

matter affirming Mr. Perez's conviction in this matter. The Court of Appeals held, in effect, that the police may limit a DUI suspect's right to counsel to telephonic contact only, regardless of interference with the ongoing investigation. The Court of Appeals also held that the defendant voluntarily waived his presence at the pretrial evidentiary hearing held with no actual notice to him. A copy of those decisions are attached.

II

Issues Presented for Review

WHETHER MR. PEREZ'S CONVICTION SHOULD BE REVERSED ON APPEAL BASED ON THE ARRESTING OFFICER'S ADMITTED DENIAL OF MR. PEREZ'S RIGHT TO CONSULT WITH COUNSEL *IN PERSON* FOLLOWING HIS ARREST?

WHETHER MR. PEREZ'S LACK OF NOTICE OF THE EVIDENTIARY HEARING IN THIS CASE DENIED MR. PEREZ THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, DENIED MR. PEREZ HIS DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AND DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL?

III

Statement of Material Facts

On September 21, 1993, at approximately 1:05 a.m. or shortly thereafter, Deputy Todd Greene stopped Mr. Perez for speeding near Craycroft Road and Sunrise Drive. (RT

August 29, 1996, p. 5-11.) Following field sobriety tests, Mr. Perez was placed under arrest at 1:25 a.m. (RT August 29, 1996, p. 11.) After being advised of his *Miranda* rights, Mr. Perez stated, according to Deputy Greene's testimony, "I want an attorney right now, Harold Hyams." He then stated, according to Deputy Greene, "I want an attorney before I do any tests right now." (RT August 29, 1996, p. 12.)

Rather than making arrangements for Mr. Perez to contact an attorney, Deputy Greene continued his investigation, inquiring as to whether Mr. Perez would submit to a chemical test. Mr. Perez agreed to take a blood test and, according to Deputy Greene's testimony, stated "I want an attorney present while I do the test" while in route to El Dorado Hospital at approximately 1:30 a.m. Deputy Greene testified that he advised Mr. Perez (erroneously) "that he was not permitted to have an attorney present during the testing and he could make a call to an attorney." Deputy Greene also testified that Mr. Perez "insisted that he have an attorney present at the test." (RT August 29, 1996, p. 14.) Because Mr. Perez insisted on having an attorney present at the test, and because Deputy Greene felt that Mr. Perez did not have the right to have an attorney present, Deputy Greene treated Mr. Perez's insistence as a refusal to complete a chemical test. (RT August 29, 1996, p. 14.)

Deputy Greene arrived at the Pima County Jail with Mr. Perez at approximately 1:45 a.m. Mr. Perez was read the Implied Consent Affidavit at the Pima County Jail. Following that reading he stated "I want an attorney present right now." Deputy Greene also noted on the affidavit that Mr. Perez "would not do test without one." (RT August 29, 1996, p. 16.) Deputy Greene testified that

he made no arrangements at the Pima County Jail for Mr. Perez to contact an attorney. (RT August 29, 1996, p. 16.) According to the Pima County Jail booking form, Mr. Perez was ultimately booked by jail personnel at 2:47 a.m. (ROA 292.) When asked by counsel for the state whether he had ever offered Mr. Perez an opportunity to make a phone call to an attorney, Deputy Greene stated "not while I was at Pre-Trial Services. I honestly don't recall." (RT August 29, 1996, p. 19.) On redirect by counsel for Mr. Perez, Deputy Greene admitted that time had not yet become a problem with respect to a chemical test. At that point Deputy Greene claimed that he had offered to allow Mr. Perez to call an attorney but that Mr. Perez wanted to have an attorney present. (RT August 29, 1996, p. 21.)

Mr. Perez, having not received notice of the evidentiary hearing, was not present at the hearing when Deputy Greene made that claim. Had Mr. Perez been present, he would have testified that, at no time, did Deputy Greene ever offer to allow him to use the telephone. (ROA at 291; RT March 3, 1997, p. 6-7.) Upon further cross-examination by counsel for Mr. Perez, Deputy Greene was forced to admit that he had not mentioned offering Mr. Perez the opportunity to use the telephone in his police report or in an interview conducted on August 21, 1996. (RT August 29, 1996, p. 22.) During the interview, when asked what opportunity he had provided Mr. Perez to contact an attorney, Deputy Greene replied "well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, p. 29.)

Mr. Perez was not at the hearing held August 29, 1996, solely because he had not received notice of the hearing. (RT March 3, 1997, p. 3.) Mr. Perez's calendar for

1996 showed no notation of a hearing on August 29. Mr. Perez and his wife, Betty Perez, both testified that they reviewed their file of documents in this case and found no notice of the August 29 hearing from trial counsel. (RT March 3, 1997, p. 3-5, 12.)

ARGUMENT I

MR. PEREZ'S CONVICTION SHOULD BE REVERSED ON APPEAL BASED ON THE ARRESTING OFFICER'S ADMITTED DENIAL OF MR. PEREZ'S RIGHT TO CONSULT WITH COUNSEL BY TELEPHONE OR IN PERSON FOLLOWING MR. PEREZ'S ARREST

A line of cases beginning with *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982), requires Mr. Perez's conviction to be set aside based solely on Deputy Green's testimony at the August 29, 1996, evidentiary hearing held in this matter. Contrary to the understanding of everyone who appeared at the August 29, 1996, evidentiary hearing in this matter, *McNutt v. Superior Court* allows an accused to contact his lawyer either by telephone or *in person*:

> "We agree with the Court of Appeals of New York, which said, 'Law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, *available in person* or by immediate telephone communication, if such access does not interfere unduly with the matter at hand.' *People v. Gursey*, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 352, 292 N.Y.S.2d 416, 418 (1968)." (Emphasis added.)

McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982).

Maryland has interpreted that identical language to permit face to face consultation:

> "Nor is the constitutional right to counsel in any event limited solely to lawyer-telephonic communication, as the superintendent further contends. In no way do we limit mode of lawyer-client communication in *Sites* or otherwise differentiate between telephone and face to face consultation. Indeed, we quoted with approval from a New York Court of Appeals case [the same quoted in *McNutt*] which involved, as here, the right of a drunk driver suspect to counsel prior to deciding whether to submit to the sobriety test 'law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand . . . ' *Sites, supra*, at 1713, 41 A.2d 192 (quoting *People v. Gursey*, 22 N.Y.2d 224, 292 N.Y.Sd 416, 418, 239 N.E.2d 351, 353 (1968))."

Brosan v. Cochran, 307 Md. 662, 669, 516 A.2d 970 (1986). See also, *State v. Kneisl*, 312 Minn. 281, 251 N.W.2d 645 (1977) ("[I]t would be a sham to permit the telephone to call and then deny the [DUI] arrested person an opportunity to consult with his attorney at the jail."); *Seattle v. Box*, 29 Wash. App. 109, 627 P.2d 584 (1981) (Once a defendant arrested and charged with driving under the influence of intoxicating liquor has made telephone contact with an attorney the police may not, without reasonable justification, prevent the attorney from making personal contact with the defendant.); *Ching v. Lewis*, 895 F.2d 608, (9th Cir. 1989) (attorney-prisoner communication by telephone, by mail, or even a hole through in the glass is not effective.); *United States v. Janis*, 820 F. Supp. 512, 517

(S.D. CA 1992) ("the court orders that the metropolitan correctional center allow Janis to conduct private, in-person consultations with his attorneys and in all pending litigation and with the court appointed investigator working on the criminal case pending in this district.").

Because Officer Green did not properly understand Mr. Perez's right to consult in person with an attorney, Mr. Perez was denied any attempt to secure that right. The remedy for such a denial, if the accused has requested an attorney and if the accused is not released immediately after the investigation, is the dismissal of the charges. *McNutt, supra*, *State v. Holland*, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985); *State v. Dennett*, slip op. No. 1 CA-CR 91-1807 (November 9, 1993). Because Mr. Perez's defense counsel had apparently not read *McNutt* nor any of several of the Arizona Supreme Court cases subsequent to *McNutt* closely enough in preparation for the hearing, she was unable to offer Judge Donfeld any guidance or to cite Judge Donfeld to the appropriate portion of *McNutt*, and provided Mr. Perez with ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984).

ARGUMENT II

MR. PEREZ'S LACK OF NOTICE OF THE EVIDENTIARY HEARING IN THIS CASE DENIED MR. PEREZ THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, DENIED MR. PEREZ HIS DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AND DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Mr. Perez was not present at the evidentiary hearing held in this matter on August 29, 1996, solely because he

did not receive notice of the hearing date.[1] Because of his involuntary absence from the hearing, Mr. Perez was unable to confront the witness, Deputy Green, he was unable to rebut the testimony of Office Green and he was unable to assist his trial counsel in further cross-examining Deputy Green.

Deputy Green offered two critical pieces of testimony which Mr. Perez was unable to confront or to rebut. The first was Deputy Green's testimony that Mr. Perez had the opportunity to request one phone call from jail personnel when he was booked in the Pima County Jail. (RT August 29, 1996, p. 16.) Had Mr. Perez been present at the evidentiary hearing, he would have pointed out to trial counsel that Deputy Green left him at the Pima County Jail in a holding cell and it was well over an hour before jail personnel removed him from the holding cell for booking, a fact easily verified by reference to Mr. Perez's booking sheet which shows him being booked into the Pima County Jail at 2:47 a.m.

Furthermore, both *Kunzler* and *State of Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989), allowed the accused to consult an attorney *before* deciding to take a chemical test. By the time Mr. Perez was booked, Deputy Green had advised him of his license suspension for refusal to take a chemical test, completed his paperwork and left the jail. Judge Donfeld obviously was not informed that the license

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[1] While a letter may have been sent to Mr. Perez, neither he nor his wife ever received it, it is not in the file hand he and his wife have kept, and it is not reflected in his 1996 calendar. Furthermore, the letter does not indicate that there will be witness testimony nor does it indicate that Mr. Perez should be present. (Defense Exhibit "B" 3/3/97.)

suspension had already been served and the investigation completed by the time that Mr. Perez was booked as Judge Donfeld commented during argument that Mr. Perez could have elected the breath test while at Pre-Trial Services. (RT August 29, 1996, at p. 29-30.) Had Mr. Perez been advised of the hearing date, he could have pointed this fact out to counsel.

Most damaging to Mr. Perez was Deputy Green's surprise testimony, in Mr. Perez's absence, that he had offered Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) Although Deputy Green quoted Mr. Perez's exact words in requesting an attorney at several points in his police report (RT August 29, 1996, p. 13, 16.), Deputy Green never mentioned in his police report offering a phone call to Mr. Perez or Mr. Perez refusing a phone call. (RT August 29, 1996, p. 22.) When interviewed by trial counsel, Deputy Green made no mention of offering Mr. Perez a phone call. (RT August 29, 1996, at p. 22.) In fact, when asked during the interview "and what opportunity did you provide him to contact this attorney?" Deputy Green replied "Well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, at p. 290.)

During examination by trial counsel, Deputy Green stated that, after the first request for an attorney, what he did next was to ask Mr. Perez if he would submit to a chemical test. (RT August 29, 1996, at p. 12.) After the next request for an attorney Deputy Green stated that what he did was to tell Mr. Perez that he was not permitted to have an attorney present during the testing. (RT August 29, 1996, at p. 14.) When questioned by trial counsel as to what opportunities he gave Mr. Perez to

contact an attorney, Office Green testified he had no opportunity at the scene to let Mr. Perez contact an attorney. (RT August 29, 1996, at p. 14.) He also testified that, while he was driving past public telephones, he did not stop to let Mr. Perez use the telephone. (RT August 29, 1996, at p. 14-15.) When the court inquired as to whether Mr. Perez was given the opportunity to call an attorney at the jail, Deputy Green still had no recollection of offering to allow Mr. Perez to call an attorney and stated that the jail personnel would allow one phone call. (RT August 29, 1996, at p. 16.) During examination by the prosecutor, Deputy Green was asked:

> Q: At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?
>
> A: Not while I was at Pre-Trial Services. I honestly don't recall.

(RT August 29, 1996, at p. 19.) After trial counsel for Mr. Perez established that Deputy Green was under no time pressure to complete the chemical tests within 2 hours and phone calls would have taken 5 to 10 minutes that Deputy Green suddenly recalled offering Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) (Even so, Deputy Green's testimony was that Mr. Perez wanted an attorney present and Deputy Green did not think that Mr. Perez had the right to have an attorney present. Even by Deputy Green's newly recovered memory, Mr. Perez's right to counsel was denied.) Deputy Green subsequently lost his newly recovered memory after the evidentiary hearing, testifying at the first trial that he gave Mr. Perez an opportunity to use the phone only by taking him to jail:

Q. What opportunity did you give him at any time to contact an attorney?

A. I informed him that phones were available at pretrial services for him to make a phone call if pretrial would allow that.

(R.T. September 6, 1996, p. 72.)

Given the previous inconsistencies in Deputy Green's testimony, reports and interview, given the sudden motive to fabricate upon being pinned down as to the lack of any time pressure, and given Deputy Green's failure to recollect the crucial issue during his interview or in his police report, Deputy Green's deception of Judge Donfeld is readily apparent. Had Mr. Perez been present at the evidentiary hearing, Mr. Perez would have testified that, at no point, did Deputy Green ever offer him the opportunity to make a phone call. (R.T. March 3, 1997, p. 6-7.)

The right of a defendant charged with a felony to be personally present in the courtroom at every stage of his trial conducted is fundamental to our system of justice. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892). This principle has been constantly upheld and continually reaffirmed. *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 26, 58, 96 L.Ed.2d 631 (1987).

The right to be present at trial is protected by the due process and confrontation clauses of the Sixth Amendment to the United States Constitution and by article II, §§ 4 and 24 of the Arizona Constitution. *State v. Levato*, 924

P.2d 445, ___ Ariz. ___ (1996). See also, *State v. Bishop*, 139 Ariz. 567, 679 P.2d 1054 (1984).

IV

Reasons the Petition Should be Granted

This Petition should be granted because this court has not directly addressed the right of a suspect to face to face consultation with an attorney, because important issues of law have been incorrectly, because Deputy Greene has denied Mr. Perez his right to counsel under *McNutt* by refusing his request to have an attorney present before testing, and because Mr. Perez never received personal notice of the August 29, 1997, evidentiary hearing.

Respectfully submitted this 12th day of April, 1998.

/s/ S. Jonathan Young
S. JONATHAN YOUNG
177 N. Church Avenue, Suite 815
Tucson, AZ 85701
State Bar No. 012598

ATTORNEY FOR PETITIONER

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

2 CA-CR 97-0185
Department B

Pima County
Cause No. CR-52507

ORDER

THE STATE OF ARIZONA,
Appellee,
v.
FERMIN C. PEREZ, aka FERNANDO PEREZ,
Appellant.

(Filed Mar. 31, 1998)

The above-entitled matter was duly submitted to the Court. The court has this day rendered its MEMORANDUM DECISION.

ORDERED: The MEMORANDUM DECISION be filed.

FURTHER ORDERED: A copy of this order together with a copy of the MEMORANDUM DECISION be sent to each party appearing herein or the attorney for such party and to The Hon. John E. Davis, Judge, and to the Hon. Michael J. Brown, Presiding Judge.

Dated: March 31, 1998

/s/ Joyce A. Goldsmith
Joyce A. Goldsmith
Clerk of the Court

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FERMIN C. PEREZ, aka FERNANDO PEREZ, Appellant.	2 CA-CR 97-0185 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court (Filed Mar. 31, 1998)

APPEAL FROM THE SUPERIOR COURT OF
PIMA COUNTY

Cause No. CR-52507

Honorable John E. Davis, Judge

AFFIRMED

Grant Woods, The Attorney General
By Paul J. McMurdie and Donna J. Lam — Tucson
Attorneys for Appellee

S. Jonathan Young — Tucson
Attorney for Appellant

ESPINOSA, Judge.

¶1 Appellant Fermin Perez was placed on probation for ten years after a jury convicted him of aggravated driving while under the influence of alcohol. The court suspended the six-month jail term and the mandatory four-month

prison term pending the outcome of appeal. On appeal Perez claims his right to counsel was violated, he was denied his due process right to attend the hearing on the pretrial motions, and trial counsel was ineffective. We affirm.

¶2 Perez first argues that he was denied his right to consult with an attorney in person before he decided whether to submit to blood testing. The transcript of the hearing on the pre-trial motions reveals that the arresting sheriff's deputy offered Perez the opportunity to make a telephone call to counsel, but he insisted that he wanted an attorney physically present. The officer told Perez more than once that he could make a telephone call to speak to counsel, but that he did not have a right to have counsel present at the time of the testing. The responsibility of resolving credibility issues lies with the trial court. *State v. Tapia*, 159 Ariz. 284, 767 P.2d 5 (1988); *State v. Vanoy*, 177 Ariz. 206, P.2d 874 (App. 1993). It was therefore for the trial court to determine, based on its assessment of the officer's credibility, whether Perez was offered the ability to make a telephone call to counsel. The trial court concluded that Perez had not been deprived of his right to counsel, apparently believing he had been given the opportunity to consult with counsel by telephone.

¶3 Perez also claims he was entitled to consult with an attorney "in person" before deciding whether to submit to chemical testing. He has not, however, cited any authority, nor have we found any, which requires that counsel be physically present. Indeed, he cites *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982), which clearly states that a defendant is entitled to confer with counsel either in person or by telephone. It is the consultation with counsel that is important, not counsel's physical presence

at the scene. *See State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989); *State v. Holland*, 147 Ariz. 453, 711 P.2d 592 (1985); *McNutt*. The trial court did not err in finding that Perez was not denied his right to counsel.

¶4 Perez also claims his due process rights were violated when the pretrial evidentiary hearing was held in his absence he was unable to confront the sheriff's deputy and assist defense counsel in cross-examination. The deputy's testimony was the basis for the trial court's determination that Perez's right to counsel had not been abridged. However, a defendant may waive his right to be present at any proceeding by voluntarily absenting himself from it. *State v. Amaya-Ruiz*, 166 Ariz. 152, 800 P.2d 1260 (1990). Defense counsel waived Perez's presence at the hearing and such waiver is binding on him. *See State v. Spreitz*, 190 Ariz. 129, 945 P.2d 1260 (1997). Moreover, at a hearing on the voluntariness of his absence from the evidentiary hearing, Perez merely claimed he did not receive counsel's letter informing him of the hearing, although he concedes in his opening brief that the letter may have been sent. In any event, he failed to appear at a second hearing on the question of his voluntary absence. On this record we cannot say the trial court abused its discretion in proceeding in Perez's absence or refusing to hold another hearing.

¶5 Because Perez's claim of ineffective assistance of counsel relates to matters outside the record on appeal, we cannot address it. His claim must be presented to the trial court pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., to allow the trial court to determine if an evidentiary hearing is warranted. *State v. Valdez*, 160 Ariz. 9, 770 P.2d 313 (1989); *State v. Carver*, 160 Ariz. 167, 771 P.2d 1382 (1989).

¶16 The judgment of conviction and the sentence imposed are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA,
Judge

CONCURRING:

/s/ John Pelander
JOHN PELANDER,
Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD,
Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STATE OF ARIZONA, Appellee, vs. FERMIN C. PEREZ Appellant.	NO. 2 CA-CR 97-0185 (Pima County Superior Court Cause No. CR-52507)

APPELLANT'S OPENING BRIEF

(Filed Sep. 15, 1997)

Law Offices
S. JONATHAN YOUNG
177 N. Church Avenue, Suite 815
Tucson, AZ 85701
State Bar No. 012598
ATTORNEY FOR APPELLANT

* * *

STATEMENT OF FACTS

On September 21, 1993, at approximately 1:05 a.m. or shortly thereafter, Deputy Todd Greene stopped Mr. Perez for speeding near Craycroft Road and Sunrise Drive. (RT August 29, 1996, p. 5-11.) Following field sobriety tests, Mr. Perez was placed under arrest at 1:25 a.m. (RT August 29, 1996, p. 11.) After being advised of his *Miranda* rights, Mr. Perez stated, according to Deputy Greene's testimony, "I want an attorney right now, Harold Hyams." He then stated, according to Deputy Greene, "I want an

attorney before I do any tests right now." (RT August 29, 1996, p. 12.)

Rather than making arrangements for Mr. Perez to contact an attorney, Deputy Greene continued his investigation, inquiring as to whether Mr. Perez would submit to a chemical test. Mr. Perez agreed to take a blood test and, according to Deputy Greene's testimony, stated "I want an attorney present while I do the test" while in route to El Dorado Hospital at approximately 1:30 a.m. Deputy Greene testified that he advised Mr. Perez (erroneously) "that he was not permitted to have an attorney present during the testing and he could make a call to an attorney." Deputy Greene also testified that Mr. Perez "insisted that he have an attorney present at the test." (RT August 29, 1996, p. 14.) Because Mr. Perez insisted on having an attorney present at the test, and because Deputy Greene felt that Mr. Perez did not have the right to have an attorney present, Deputy Greene treated Mr. Perez's insistence as a refusal to complete a chemical test. (RT August 29, 1996, p. 14.)

Although there were public pay phones available, Deputy Greene testified that he did not stop to provide Mr. Perez the opportunity to make a phone call. (RT August 29, 1966, p. 14-15.) Deputy Greene arrived at the Pima County Jail with Mr. Perez at approximately 1:45 a.m. Mr. Perez was read the Implied Consent Affidavit at the Pima County Jail. Following that reading he stated "I want an attorney present right now." Deputy Greene also noted on the affidavit that Mr. Perez "would not do test without one." (RT August 29, 1996, p. 16.) Deputy Greene testified that he made no arrangements at the Pima County Jail for Mr. Perez to contact an attorney. (RT August 29, 1996, p. 16.) According to the Pima County Jail booking form, Mr.

Perez was ultimately booked by jail personnel at 2:47 a.m. (ROA 292.) When asked by counsel for the state whether he had ever offered Mr. Perez an opportunity to make a phone call to an attorney, Deputy Greene stated "not while I was at Pre-Trial Services. I honestly don't recall." (RT August 29, 1996, p. 19) On redirect by counsel for Mr. Perez, Deputy Greene admitted that time had not yet become a problem with respect to a chemical test. At that point Deputy Greene claimed that he had offered to allow Mr. Perez to call an attorney but that Mr. Perez wanted to have an attorney present. (RT August 29, 1996, p. 21.)

Mr. Perez, having not received notice of the evidentiary hearing, was not present when Deputy Greene made that claim. Had Mr. Perez been present, he would have testified that, at no time, did Deputy Greene ever offer to allow him to use the telephone. (ROA at 291; RT March 3, 1997, p. 6-7.) Upon further cross-examination by counsel for Mr. Perez, Deputy Greene was forced to admit that he had not mentioned offering Mr. Perez the opportunity to use the telephone in his police report or in an interview conducted on August 21, 1996. (RT August 29, 1996, p. 22.) During the interview, when asked what opportunity he had provided Mr. Perez to contact an attorney, Deputy Greene replied "well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, p. 29.)

Mr. Perez was not at the hearing held August 29, 1996, solely because he had not received notice of the hearing. (RT March 3, 1997, p. 3.) Mr. Perez's calendar for 1996 showed no notation of a hearing on August 29. Mr. Perez and his wife, Betty Perez, both testified that they reviewed their file of documents in this case and found no

notice of the August 29 hearing from trial counsel. (RT March 3, 1997, p. 3-5, 12.)

On March 26, 1996, a direct indictment was filed in the Pima County Superior Court charging Mr. Perez with one count of aggravated DUI in violation of A.R.S. § 28-697. (ROA 1.) On August 16, 1996, trial counsel filed a Motion to Dismiss based on Mr. Perez's repeated request to have an attorney present. (ROA 83.) That motion was denied by Judge Donfeld on August 29, 1996. On September 6, 1996, the first trial held in this matter resulted in a mistrial following a hung jury. (ROA 181-183.) Trial counsel for Mr. Perez filed a Motion to Reconsider on December 5, 1996, citing to *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982) and *State v. Holland*, 147 Ariz. 453, 711 P.2d 592 (App. 1985). (ROA 195-208.) The Motion to Reconsider was denied on December 16, 1996, by Judge Donfeld (ROA 212.) and, on December 23, 1996, following the second jury trial held in this matter, Mr. Perez was convicted of a single count of DUI. On February 4, 1997, present counsel for Mr. Perez substituted into the case. A motion for Mr. Perez's release pending appeal, a motion to vacate judgement, and a request for hearing to determine the voluntariness of Mr. Perez's absence from the August 29, 1996, evidentiary hearing were filed on February 19, 1997. (ROA 275-326.) On March 10, 1997, Judge Davis granted Mr. Perez's release on an appeal bond and denied the other motions. (ROA 274-336.) Mr. Perez was sentenced in this matter on April 11, 1997 (ROA 345-351.), and a Notice of Appeal was filed the same date in court. (ROA 352-353.)

ARGUMENT I

MR. PEREZ'S CONVICTION SHOULD BE REVERSED ON APPEAL BASED ON THE ARRESTING OFFICER'S ADMITTED DENIAL OF MR. PEREZ'S RIGHT TO CONSULT WITH COUNSEL BY TELEPHONE OR IN PERSON FOLLOWING MR. PEREZ'S ARREST

A line of cases beginning with *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982), requires Mr. Perez's conviction to be set aside based solely on Deputy Green's testimony at the August 29, 1996, evidentiary hearing held in this matter.

Contrary to the understanding of everyone who appeared at the August 29, 1996, evidentiary hearing in this matter, *McNutt v. Superior Court* allows an accused to contact his lawyer either by telephone or *in person*:

> "We agree with the Court of Appeals of New York, which said, 'Law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, *available in person* or by immediate telephone communication, if such access does not interfere unduly with the matter at hand.' *People v. Gursey*, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 352, 292 N.Y.S.2d 416, 418 (1968)." (Emphasis added.)

McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982). The court went on to state, footnote number 2, "If the lawyer cannot be reached by telephone *or cannot promptly appear where the defendant is*, the state may continue with its detention procedures." (Emphasis added.) The defendant is entitled to consult with the attorney "*before* taking a chemical breath test." *Kunzler v. Superior Court*, 154 Ariz. 568, 744 P.2d 669 (1987).

Deputy Green repeatedly testified that, following his arrest, Mr. Perez repeatedly stated that he "wanted an attorney right now" or that he "wanted an attorney present." (RT August 29, 1996, p. 12, 13, 14, 15, 16, 18, 19, 21, 22 and 23.) Deputy Green testified to his apparent misunderstanding of a suspect's right to counsel, stating "I had been trained that it was not his right to have an attorney present at the point of the chemical test." (RT August 29, 1996, p. 23.) Deputy Green also testified repeatedly that he told Mr. Perez that Mr. Perez did not have the right to have an attorney present. (RT August 29, 1996, p. 14, 18-19, 22 and 23-24.) Even the prosecutor stated during oral argument, "He's not entitled to have an attorney present. . . . " (RT August 29, 1996, p. 27.)

Because Officer Green did not properly understand Mr. Perez's right to consult in person with an attorney, Mr. Perez was denied any attempt to secure that right. Because Mr. Perez's defense counsel had apparently not read *McNutt* nor any of several of the Arizona Supreme Court cases subsequent to *McNutt* closely enough in preparation for the hearing, she was unable to offer Judge Donfeld any guidance or to cite Judge Donfeld to the appropriate portion of *McNutt*.

The language in *McNutt* permitting a defendant to consult with his lawyer in person was repeated in *State v. Holland*, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985), in *Kunzler v. Superior Court*, 154 Ariz. 568, 570, 744 P.2d 669, 671 (1987) and in *State v. Juarez*, 161 Ariz., 76, 80, 775 P.2d 1140, 1144 (1989). *See also Ching v. Lewis*, 895 F.2d 608 (9th Cir. 1989), reversing grant of summary judgement in § 1983 case and holding that the arbitrary policy of denying contact visits with attorney, requiring instead that the prisoner communicate with attorney

through hole in glass, or by mail or by telephone, prohibits effective attorney-client communication.

The remedy for such a denial, if the accused has requested an attorney and if the accused is not released immediately after the investigation, is the dismissal of the charges. *McNutt*, *supra*; *State v. Holland*, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985); *State v. Dennett*, slip op. No. 1 CA-CR 91-1807 (November 9, 1993). In *Holland*, as in *McNutt*, the Supreme Court required that the charges be dismissed as the remedy stating that it is impossible to foresee what advice would have been given the defendant had he been able to confer privately with counsel.

The state seems to indicate, in its written response to Mr. Perez's *McNutt* Motion filed prior to the evidentiary hearing, that the fact that any consultation with an attorney would have delayed somewhat the DUI investigation excuses Deputy Green's refusal to allow Mr. Perez to have an attorney present. The accused is entitled to such access, however, as long as it does not interfere *unduly* with the matter at hand. *State v. Holland*, 147 Ariz. at 464; *McNutt v. Superior Court*, 133 Ariz. at 9; *Kunzler v. Superior Court*, 154 Ariz. at 570; *State v. Juarez*, 161 Ariz. at 80. Mr. Perez was stopped at 1:05 a.m. and placed under arrest at 1:25 a.m. At that point he began requesting an attorney. (RT August 29, 1996, p. 11-12.) Deputy Green testified that time was not a problem with respect to the 2 hour window for obtaining a blood test. (RT August 29, 1996, p. 20.) As the time factor was not a factor, and as Deputy Green interpreted Mr. Perez's demand to have an attorney present as a refusal to take the breath test, the request for an attorney could not have presented the prospect of undue delay. If fact, based on Deputy Green's treatment of the request for counsel as a

refusal, all that remained at that point was to transport Mr. Perez to the Pima County Jail. The state appears, however, to have abandoned the idea of undue delay at the evidentiary hearing.

Had trial counsel read any of the relevant cases, *McNutt*, *Holland*, *Kunzler* or *Juarez*, prior to the evidentiary hearing, she could have pointed out to Judge Donfeld that Deputy Green and the prosecutor were both incorrect in their assertions that Mr. Perez was not entitled to consult an attorney in person before taking a chemical test. Based solely on the testimony of Deputy Green, the charges should have been dismissed. The touchstone of an ineffective assistance of counsel claim is whether the defendant was denied a fair trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984); *State v. Valdez*, 167 Ariz. 328, 806 P.2d 1376 (1991). The defendant must show first that trial counsel's performance fell below an objective standard of reasonably effective assistance under prevailing professional norms, and second, that trial counsel's performance has prejudiced defendant's case. *State v. Valdez*, *supra*. Trial counsel's basic unfamiliarity with the cases upon which she was relying falls below an objective standard. The fact that the language of the cases is outcome determinative establishes the prejudice.

ARGUMENT II

MR. PEREZ'S LACK OF NOTICE OF THE EVIDENTIARY HEARING IN THIS CASE DENIED MR. PEREZ THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, DENIED MR. PEREZ HIS DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AND DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Mr. Perez was not present at the evidentiary hearing held in this matter on August 29, 1996, solely because he did not receive notice of the hearing date.[1] Because of his involuntary absence from the hearing, Mr. Perez was unable to confront the witness, Deputy Green, he was unable to rebut the testimony of Office Green and he was unable to assist his trial counsel in further cross-examining Deputy Green.

Deputy Green offered two critical pieces of testimony which Mr. Perez was unable to confront or to rebut. The first was Deputy Green's testimony that Mr. Perez had the opportunity to request one phone call from jail personnel when he was booked into the Pima County Jail. (RT August 29, 1996, p. 16.) Had Mr. Perez been present at the evidentiary hearing, he would have pointed out to trial counsel that Deputy Green left him at the Pima County Jail in a holding cell and it was well over an hour before jail personnel removed him from the holding cell for

[1] While a letter may have been sent to Mr. Perez, neither he nor his wife ever received it, it is not in the file he and his wife have kept, and it is not reflected in his 1996 calendar. Furthermore, the letter does not indicate that there will be witness testimony nor does it indicate that Mr. Perez should be present. (Defense Exhibit "B" 3/3/97.)

booking, a fact easily verified by reference to Mr. Perez's booking sheet which shows him being booked into the Pima County Jail *at 2:47 a.m.*

Trial counsel further exhibited her lack of familiarity with the *McNutt* line of cases by failing to point out to the court that both *Kunzler* and *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989), allow the accused to consult an attorney *before* deciding to take a chemical test. By the time Mr. Perez was booked, Deputy Green had advised him of his license suspension for refusal to take a chemical test, completed his paperwork and left the jail. Judge Donfeld obviously was not informed that the license suspension had already been served and the investigation completed by the time that Mr. Perez was booked as Judge Donfeld commented during argument that Mr. Perez could have elected the breath test while at Pre-Trial Services. (RT August 29, 1996, at p. 29-30.)

Most damaging to Mr. Perez was Deputy Green's surprise testimony, in Mr. Perez's absence, that he had offered Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) Although Deputy Green quoted Mr. Perez's exact words in requesting an attorney at several points in his police report (RT August 29, 1996, p. 13, 16.), Deputy Green never mentioned in his police report offering a phone call to Mr. Perez or Mr. Perez refusing a phone call. (RT August 29, 1996, at p. 22.) When interviewed by trial counsel, Deputy Green made no mention of offering Mr. Perez a phone call. (RT August 29, 1996, at p. 22.) In fact, when asked during the interview "and what opportunity did you provide him to contact this attorney?" Deputy Green replied "Well, at that point, I took him to jail because he said earlier while we were in

the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, at p. 29.)

During examination by trial counsel, Deputy Green stated that, after the first request for an attorney, what he did next was to ask Mr. Perez if he would submit to a chemical test. (RT August 29, 1996, at p. 12.) After the next request for an attorney Deputy Green stated that what he did was to tell Mr. Perez that he was not permitted to have an attorney present during the testing. (RT August 29, 1996, at p. 14.) When questioned by trial counsel as to what opportunities he gave Mr. Perez to contact an attorney, Office Green testified he had no opportunity at the scene to let Mr. Perez contact an attorney. (RT August 29, 1996, at p. 14.) He also testified that, while he was driving past public telephones, he did not stop to let Mr. Perez use the telephone. (RT August 29, 1996, at p. 14-15.) When the court inquired as to whether Mr. Perez was given the opportunity to call an attorney at the jail, Deputy Green still had no recollection of offering to allow Mr. Perez to call an attorney and stated that the jail personnel would allow one phone call. (RT August 29, 1996, at p. 16.) During examination by the prosecutor, Deputy Green was asked:

> Q: At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?
>
> A: Not while I was at Pre-Trial Services. I honestly don't recall.

(RT August 29, 1996, at p. 19.) After trial counsel for Mr. Perez established that Deputy Green was under no time pressure to complete the chemical tests within 2 hours and phone calls would have taken 5 to 10 minutes that Deputy

Green suddenly recalled offering Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) (Even so, Deputy Green's testimony was that Mr. Perez wanted an attorney present and Deputy Green did not think that Mr. Perez had the right to have an attorney present. Even by Deputy Green's newly recovered memory, Mr. Perez's right to counsel was denied.) Deputy Green subsequently lost his newly recovered memory after the evidentiary hearing, testifying at the first trial that he gave Mr. Perez an opportunity to use the phone only by taking him to jail:

> Q. What opportunity did you give him at any time to contact an attorney?
>
> A. I informed him that phones were available at pretrial services for him to make a phone call if pretrial would allow that.

(R.T. September 6, 1996, p. 72)

Given the previous inconsistencies in Deputy Green's testimony, reports and interview, given the sudden motive to fabricate upon being pinned down as to the lack of any time pressure, and given Deputy Green's failure to recollect the crucial issue during his interview or in his police report, Deputy Green's deception of Judge Donfeld is readily apparent. Had Mr. Perez been present at the evidentiary hearing, Mr. Perez would have testified that, at no point, did Deputy Green ever offer him the opportunity to make a phone call. (R.T. March 3, 1997, p. 6-7.)

The right of a defendant charged with a felony to be personally present in the courtroom at every stage of his trial conducted is fundamental to our system of justice. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be

done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892). This principle has been constantly upheld and continually reaffirmed. *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). One of the most basic of the rights guaranteed by the confrontation clause is the accused right to be present at every stage of his trial. *Lewis v. United States*, *supra*. The Supreme Court has also stated that a defendant "has a due process right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 26, 58, 96 L.Ed.2d 631 (1987). The court in *Stincer* also stated that a defendant is constitutionally "guaranteed the right to present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Stincer*, 482 U.S. at 745.

The right to be present at trial is protected by the due process and confrontation clauses of the Sixth Amendment to the United States Constitution and by article II, §§ 4 and 24 of the Arizona Constitution. *State v. Levato*, 924 P.2d 445, ___ Ariz. ___ (1996). 17 A.R.S. Rules of Crim.Proc., Rule 9.1, permits the inference that a defendant is voluntarily absent from a proceeding, thus waiving his rights to confrontation and due process, if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence.

In *State v. Bishop*, 139 Ariz. 567, 679 P.2d 1054 (1984), the court remanded for a new competency hearing where the record was insufficient to conclude that the

defendant was aware of the nature of the third and fourth days of his Rule 11 hearing when he refused transportation from the jail to court. The new hearing was to be held either in the defendant's presence or with his presence to have been found properly and voluntarily waived. Mr. Perez similarly requests that the evidentiary hearing in this matter be held in his presence as he maintained constant contact with both his attorney and Pre-Trial Services and yet never received notice that the hearing was being held and cannot, therefore, be said to have waived his right to confront Deputy Green and to be present to testify and to assist his attorney at the hearing.

CONCLUSION

As Deputy Green has denied Mr. Perez his right to counsel under *McNutt* by refusing his request to have an attorney present before testing, Mr. Perez requests that his conviction in this matter be set aside.

As Mr. Perez never received personal notice of the August 29, 1997, evidentiary hearing, and as his presence was necessary to a fair determination of the facts at that hearing, Mr. Perez alternatively requests that this matter be remanded for a hearing to be held in his presence.

Respectfully submitted September 12, 1997.

/s/ S. Jonathan Young
S. Jonathan Young
Attorney for
Defendant/Appellant

SUPERIOR COURT OF ARIZONA

(Filed Apr. 11, 1997)

PIMA COUNTY

TUCSON, AZ

[James N. Corbett]

8	April 11, 1997	Hon. John E. Davis	Rosemarie Chastain
Div	Date	Judge	Deputy

NO. **CR-52507**

STATE OF ARIZONA

VS

FERMIN C. PEREZ, aka Fermin C. Perez, Fernando Perez

Michael Gatto on behalf of Vehicular Offense Team for the State

S. Jonathan Young for the Defendant

DATE(S) OF BIRTH: 7/7/63; 7/7/62

SENTENCE OF PROBATION

The State is represented by the above named Deputy County Attorney; the Defendant is present with counsel named above.

COURT REPORTER: Terri Faust

The Defendant is advised of the charge and the determination of guilt, and all parties are given the opportunity to speak.

Pursuant to A.R.S. Section 13-607, the Court finds as follows:

JURY VERDICT The determination of guilt was based upon a verdict of guilty after a jury trial.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the court enters the following judgment and sentence.

IT IS THE JUDGMENT OF THE COURT that the Defendant is guilty of the crime of COUNT ONE, AGGRAVATED DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR, WHILE LICENSE OR PRIVILEGE TO DRIVE IS SUSPENDED, CANCELED, REVOKED OR REFUSED OR IN VIOLATION OF A RESTRICTION, a Class four felony, nondangerous and nonrepetitive offense, in violation of A.R.S. 28-697(A)(1), (D), (E), (H), (I) and (J); 28-692(A)(1) committed on September 21, 1993.

Upon consideration of the offense, and the facts, law and circumstances involved in this case,

THE COURT FINDS that the Defendant is eligible for probation. The specific reasons for the granting of probation are stated by the Court on the record.

The Court further finds that the term of probation should include incarceration in the County Jail as a term and condition of probation.

As punishment for this/these crime(s),

IT IS ORDERED suspending imposition of sentence and placing the Defendant on probation for a period of 10 year(s) commencing this date, April 11, 1997 under the supervision of the Adult Probation Department of this Court, in accordance with the formal Judgment and Order suspending sentence and imposing terms of probation signed by the Court.

As conditions of probation, the defendant shall:

1. Pay monthly probation fees to the Clerk of the Superior Court of $50.

2. Be incarcerated in the Pima County Jail for a period of 6 month(s), which **jail sentence is suspended** pending resolution of the defendant's appeal. During the service of that sentence, the defendant will be eligible for work furlough.

3. Pay $100 to the Victim Compensation Fund.

4. Pay attorney's fees of $1,000, payable to the Clerk of the Superior Court.

5. Pay a fine of $2,000, payable to the Clerk of the Superior Court.

6. If assessments are not paid this same date, the defendant is further assessed $12 pursuant to A.R.A. Section 12-116.

7. Contribute 85 hours of community service, at the rate of not less than ten (10) hours per month.

8. Abide by all requirements contained in the Conditions of Probation and be subject to all requirements in Attachment A to the Conditions of Probation, in the discretion of the probation officer.

9. Consume no alcoholic beverages.

10. Participate in treatment and/or training programs as directed by the probation officer.

11. In accordance with A.R.S. 12-299, participate in the Community Punishment Program, including participating in substance abuse counseling, performing 85 hours

community service, abiding by curfew/approved schedule, submitting to drug/alcohol tests, consuming no alcohol and participating in a life/social skills program. THE COURT FINDS that, but for the Community Punishment Program, the defendant would be sentenced to jail or prison.

12. Not operate a motor vehicle without a valid driver's license and not obtain a driver's license unless and until the probation officer approves.

13. Take Antabuse if medically prescribed and at the direction of the probation officer.

14. Attend the MADD-Victim Impact Penal.

On agreement,

IT IS FURTHER ORDERED that all conditions of probation are considered conditions of the defendant's release while on released on appeal bond and any violation of those can result in a motion to revoke release even though an appeal bond has been posted and could result in the defendant going to jail or to the Department of Corrections.

IT IS THE FURTHER JUDGMENT AND SENTENCE OF THE COURT that the defendant is sentenced to the mandatory prison term of FOUR(4) MONTHS, which **prison sentence is suspended** because of the granting of the appeal bond in this case. Should the conviction be affirmed or the defendant not remain on appeal bond, he must serve the mandatory four months in the Department of Corrections.

IT IS FURTHER ORDERED that the driver's license issued to the defendant is forfeited to the court at this time pursuant to statute. The Clerk is directed to forward

the defendant's driver's license to the Motor Vehicle Department.

The written terms and conditions of probation are handed to the Defendant for explanations, acceptance, and signature. Defendant agrees to the stated waiver of right of extradition. The Defendant is advised concerning the consequences of failure to abide by the conditions of probation.

The Defendant is advised concerning rights of review and written notice of those rights is provided.

ISSUED: Order of Release

IT IS ORDERED that the Clerk of the Superior Court remit to the Department of Corrections a copy of this Order, plus all pre-sentence reports, probation violation reports, medical and psychological reports relating to the Defendant and involving this cause.

FILED: Conditions of Probation and Notice of Right to Review, both signed by the Defendant and copies provided to the Defendant; Presentence Report – Part One.

Let the record reflect that the Defendant's fingerprint is permanently affixed to the signature page of this sentencing order in open Court.

FILED IN COURT: Notice of Appeal Conditions of Release Setting Bond on Appeal in the Amount of $1,100
Surety Bond on Appeal in the Amount of $1,100

/s/ John E. Davis
HON. JOHN E. DAVIS

cc: Hon. John E. Davis
Criminal Calendaring
County Attorney – Vehicular Offense Team (3)
County Attorney – Victim Notification
S. Jonathan Young, Esq.
Adult Probation – James C. Robinett, Senior Deputy (1cert/2c)
Clerk of Court – Accounting
Clerk of Court – Collections
Clerk of Court – Appeals
Clerk of Court – Criminal Desk
Sheriff – 1 certified (***Note: jail sentence suspended pending appeal.**)
Sheriff – 3 certified
DOC – 1 certified (***Note: prison sentence suspended pending appeal.**)
Pretrial-Services
Arizona Motor Vehicle Department, Department of Transportation, P.O. Box 2100, Phoenix, AZ 85007 –1
Certified

[Defendant's Fingerprint Omitted in Printing]

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. JOHN E. DAVIS CASE NO. **CR-52507**

COURT REPORTER: none DATE: March 10, 1997

STATE OF ARIZONA

V.S.

FERMIN C. PEREZ,
aka Fernando nmn Perez

MINUTE ENTRY

UNDER ADVISEMENT RULING

IT IS ORDERED the Defendant's request for Judgment to be vacated is DENIED.

IT IS FURTHER ORDERED the Defendant's request for re-hearing of Judge Donfeld's rulings on the Defendant's pretrial motions is DENIED.

IT IS FURTHER ORDERED the Defenadnt's request for Appeal Bond pursuant to Rule 7.2(6)(1) is GRANTED.

/s/ John E. Davis
HON. JOHN E. DAVIS

cc: Hon. John E. Davis
Criminal Calendaring
County Attorney – Kathleen Quigley
County Attorney – Michael Gatto
S. Jonathan Young, Esq.
Clerk of Court – Under Advisement Clerk

/s/ Rosemarie Chastain/jag
Deputy Clerk

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,	)	
Plaintiff,	)	
vs.	)	Case No. CR-52507
FERMIN PEREZ,	)	2CA-CR 97-0185
Defendant.	)	

March 3, 1997

Tucson, Arizona

REPORTER'S OFFICIAL TRANSCRIPT

MOTION

BEFORE: THE HON. JOHN E. DAVIS, JUDGE

APPEARANCES:

MICHAEL GATTO, Esq.
County Attorney's Office
appearing on behalf of the State;

JONATHAN YOUNG, Esq.
Attorney at Law
appearing on behalf of the Defendant.

DEFENSE

Terri L. Faust
Court Reporter

[2] FERMIN PEREZ,

having been sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. YOUNG:

Q. Sir, will you please tell us your name?

A. Fermin Perez.

Q. How old are you?

A. 33 years old.

Q. And where do you work?

A. Citizens Utility Company.

Q. Are you the defendant in this case?

A. Yes, I am.

Q. And your sentencing is pending now, you understand, on the 17th of this month?

A. Yes.

Q. Can you tell us who your attorney was for your trial?

A. Tamara Walters.

Q. And how many times was that trial held?

A. The trial was held twice.

Q. Okay. Before those trials took place, there was a hearing held on August 29th of last year. Were you present at that hearing?

A. No, I wasn't.

[3] Q. Was there any reason why you weren't present at that hearing?

A. I didn't know I was supposed to be there.

Q. Have you looked at your calendar for last year?

A. Yes.

Q. And where were you on August 29th of last year?

A. In Nogales.

Q. Did you bring the calendar with you today?

A. Yes, I did.

Q. How many days were you in Nogales last week?

A. I was there virtually all week, with the exception of Wednesday.

Q. Do you recall receiving any notice of that hearing?

A. No, I don't.

MR. YOUNG: May I approach the witness, Your Honor?

THE COURT: Yes.

BY MR. YOUNG:

Q. Sir, I'll ask you to refer to what's been marked as Defense Exhibit A. Ask you if you recognize that calendar?

A. Yes, I do.

Q. Is that your calendar from August of 1996?

A. Yes, it was.

Q. And did you refer to it at my request?

A. I did.

Q. On August 29th, do you have any indication that [4] you have a court hearing on that date?

A. No, I don't.

Q. Have there been any changes made to that calendar since last August?

A. No.

MR. YOUNG: I'll move for the admission of Defense A, Your Honor.

MR. GATTO: No objection.

THE COURT: A will be admitted.

(Defense Exhibit A admitted into evidence.)

BY MR. YOUNG:

Q. Along those lines sir, were you present earlier this year at a motion to set aside a judgment which Ms. Walters filed in your case?

A. Could you explain that again?

Q. This year, do you recall a motion being heard by Judge Davis to set aside the judgment in this case?

A. Yes, I have.

Q. And was that held at the same time as I substituted in as counsel of record for you?

A. Yes.

Q. How did you find out about that hearing?

A. Again, I had no idea that I was supposed to be there. The only way I was notified is by you. You had informed me.

[5] Q. Did I ask you whether or not you were going to be there?

A. Yes. Asked me, yes.

Q. Do you recall receiving any letters from Ms. Walters regarding that hearing?

A. No, I don't.

Q. And have you searched – do you keep a file on this case?

A. Absolutely.

Q. Have you looked through that file for any letters from Ms. Walters regarding a hearing on August 29th?

A. Yes.

Q. Did somebody else help you search through that file?

A. Yes.

Q. Who's that?

A. My wife, Betty Perez.

Q. Is she here today?

A. Yes, she is.

Q. How long have you been married?

A. 14 years – or going on 14 years, I'm sorry.

Q. If you were present at that hearing, there are two issues that I would like to ask you about. One is after you were booked in to the Pima County jail on this case, was there a period of time that you spent in the holding cell before [6] Pretrial Services came to get you?

A. Yes.

Q. And approximately how long was that period of time?

A. Approximately an hour to an hour and-a-half.

Q. Had you over talked to Ms. Walters about that period of time previously?

A. She never asked. We never discussed it.

Q. And do you recall what time they actually booked you?

A. I believe it was just before 2:00 o'clock.

Q. Could you be mistaken about that?

A. I could be.

Q. Also along those lines, do you recall requesting an attorney that evening?

A. Yes.

Q. And who did you request to allow you to contact an attorney?

A. Well, I requested that of Officer Green.

Q. How many times did you request that?

A.. Twice.

Q. Did Mr. – Officer Green ever give you the opportunity to contact an attorney?

A. No, he didn't.

Q. Did he ever offer you a telephone call?

A. No, he didn't.

[7] Q. Have you reviewed the testimony of Officer Green at that hearing on August 29th?

A. Yes, I did.

Q. Have you seen the part where he ultimately stated that he did offer you a telephone call?

A. Yes, I did.

Q. And do you disagree with that?

A. Absolutely, I disagree.

Q. Now Officer Green stated that you wished to have an attorney present. Was that actually the case?

A. I asked to contact an attorney either in person or by phone.

Q. Would you have liked to have had an attorney present?

A. Absolutely. I'd love to have an attorney present.

Q. If you were going to have an attorney present, how would you arrange that at that time of night to have an attorney present?

A. I would have to call them via telephone.

Q. And your testimony is that you did not refuse to use the telephone?

MR. GATTO: Objection. Leading.

THE WITNESS: I did not –

THE COURT: Overruled. He can answer.

MR. YOUNG: That's all I have, Your Honor.

[8] THE COURT: Cross-examination?

MR. GATTO: Thanks, Judge.

CROSS-EXAMINATION

BY MR. GATTO:

Q. Mr. Perez, this incident we're talking about occurred back in 1993, right?

A. Yes, sir.

Q. September 21st?

A. Yes, sir.

Q. You were drinking alcohol that night, weren't you?

A. Yes, sir.

Q. You testified at two trials in this matter, right?

A. Yes, sir.

Q. The first one was September, October of last year?

A. About that time; yes, sir.

Q. And then the second one was in December?

A. Yes, sir.

Q. And from the two trials you changed your testimony on a number of points; isn't that correct?

A. I can't recall.

Q. Well, let's ask you about the size of your engine. You changed your testimony specifically on the point regarding the size of your engine; isn't that correct?

A. Yes.

Q. At the first trial you testified it was – withdraw [9] that question.

In regard to your testimony on that issue, you alleged your car could not go a hundred miles an hour, correct?

A. That's correct.

Q. The second trial Deputy Green testified that your car had a V-8 engine in it; isn't that correct?

A. That's correct.

Q. And you had testified on two occasions the car only had a V-6. Is that correct?

A. I believed that's what it had at the time.

Q. At the second trial there was an issue regarding your weight, correct?

A. That's correct.

Q. You testified on the night of your arrest you weighed 240 pounds?

A. Approximately.

Q. You were handed – you also testified that you had weighed approximately 240 pounds for the last six to eight years, correct?

A. Approximately.

Q. Preceding the date of that trial?

A. I'm sorry.

Q. Preceding the date of that trial. So from 1990 to 1996, you hadn't weighed less than 240, correct?

[10] A. Yes, sir.

Q. You were handed at that trial a photo of your driver's license, which represented your weight as 200 pounds, correct?

A. Yes.

Q. That was information you provided to Motor Vehicle Division regarding your weight. Correct?

A. That's correct.

Q. In regards to the incident that took place the night of your arrest, Deputy Green did allow you an opportunity to make a phone call at Pretrial Services; isn't that correct?

A. No.

Q. He provided you a phone book?

A. No.

Q. Told you there was a phone available at Pretrial Services when you were there, correct?

A. No. He didn't advise me at all.

Q. In regards to your request to have an attorney, you told Deputy Green you wanted to have an attorney physically present for the blood draw; is that correct?

A. Either present or by telephone.

Q. Deputy Green told you you did not have the right to have an attorney present for the draw. Correct?

A. That's what he told me, yes.

[11] MR. GATTO: I don't have any further questions, Judge.

THE COURT: Any redirect, Mr. Young?

MR. YOUNG: Nothing further, Your Honor.

THE COURT: Okay. Thank you, sir. You can step down. Have a seat with your attorney.

MR. YOUNG: I'll call one other witness, Your Honor. Betty Perez.

BETTY PEREZ,

having been sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

THE COURT: Ma'am, would you have a seat right there, please?

DIRECT EXAMINATION

BY MR. YOUNG:

Q. Ma'am, would you please tell us your name?

A. My name is Betty Jean Perez.

Q. Do you know Fermin Perez?

A. Yes, I do.

Q. Is he the gentleman seated here next to me?

A. Yes. Uh-huh.

Q. How long have you known Mr. Perez?

A. Um, I've known him for a long time. We were first introduced at age 16, and we've been married for almost 14 years.

[12] Q. Were you aware of his arrest in 1993 for DUI?

A. Yes, I was.

Q. And that was the case that we're here on today; is that right?

A. Mm-hm. Yes.

Q. Since that time have you, along with Mr. Perez, maintained a file regarding that arrest?

A. Um – yes, I have.

Q. What kinds of things go into that file?

A. I put everything in there that the attorney sends us.

Q. And what kinds of things do the attorneys send you?

A. They send us letters – just mostly letters and motions they make.

Q. At my request did you go through that file with Mr. Perez?

A. Yes, I did.

Q. And were you and Mr. Perez able to find any letters from Tamara Walters indicating that there was a hearing that was going to be held on August 29th of 1996?

A. No. I didn't find anything.

Q. And when did you go through that file?

A. Um, we went through that file just like a week ago, I guess.

MR. YOUNG: That's all I have, Your Honor.

[13] THE COURT: Cross-examination?

MR. GATTO: No cross, Judge.

THE COURT: Thank you, ma'am. You can step down.

* * *

[14] CERTIFICATE

I, Terri L. Faust, do hereby certify that I took the machine shorthand notes in the foregoing matter; that the same was transcribed via computer-aided transcription; that the preceding pages of typewritten matter are a true, correct and complete transcription of those proceedings ordered, to the best of my skill and ability.

/s/ Terri L. Faust
Terri L. Faust
Court Reporter
Pima County Superior Court
Tucson, Arizona

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CR-52507
FERMIN C. PEREZ,	)	
	)	
Defendant.	)	

Thursday, August 29, 1996
Tucson, Arizona

OFFICIAL COURT REPORTER'S TRANSCRIPT
HEARING ON PENDING MOTIONS
BEFORE: THE HON. ROBERT B. DONFELD, JUDGE

APPEARANCES:

For the State:

MICHAEL E. GATTO, Esq.,
Deputy County Attorney

– – –

For the Defendant:

TAMARA R. WALTERS, Esq.,
Attorney at Law

VAN G. HONEMAN, RDR
OFFICIAL COURT REPORTER
Pima County Superior Court
Tucson, Arizona

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PROCEEDINGS

THE COURT: 52407, Perez.

MR. GATTO: Michael Gatto for the D.U.I. trial team for the State.

MS. WALTERS: Tamara Walters appearing on behalf of Mr. Perez, who is out of custody and not present. I am going to peek out in the hallway to see if he –

THE COURT: Okay.

(Pause).

MS. WALTERS: I don't see him. I'll waive his presence.

THE COURT: All right. What is this – there are pending motions?

MS. WALTERS: Yes.

MR. GATTO: That's correct, Judge. Ms. Walters filed a number of motions. With the [3] exception of the Miranda motion, the burden of going forward rests with

the defendant. She can handle that without her client present.

THE COURT: All right. We're going to need some testimony, is that correct, or did you want to submit this on the facts? Are the facts disputed?

MS. WALTERS: I haven't received the State's response, so I don't know –

THE COURT: Nor have I.

MR. GATTO: Judge, I'm covering this for Ms. Click. She did file oppositions. I have two copies here.

THE COURT: Why don't you give them to Ms. Walters and she can read the opposition?

Let me take care of this other matter. It shouldn't take very long.

(Another case was heard.)

THE COURT: Be seated.

Did you guys work it out?

MS. WALTERS: We narrowed it down. They won't give the guy a misdemeanor D.U.I., so –

THE COURT: Well, maybe he's not entitled to one.

Okay. So where are we at in terms of motions?

[4] We have the motion to dismiss, no independent blood test, that's one; we have motion to dismiss, probable cause; motion to dismiss, rule 8; motion to suppress statements; denied counsel; Motion in Limine, refusal. Right?

MS. WALTERS: And there was another just general Motion in Limine for suppression of certain statements regarding license and the arrest.

THE COURT: Are the facts in dispute? Do we actually need the officer's testimony?

MS. WALTERS: Well, we probably do need the testimony.

THE COURT: Okay. Call your witness.

MS. WALTERS: Briefly. We've agreed to narrow it down, but I think you probably should hear him.

THE COURT: Okay. Who is going to call the officer?

MS. WALTERS: Both of us are calling him.

THE COURT: We'll call him a State's witness.

I'm sorry. Officer, what's your name?

THE WITNESS: Todd Edward Greene.

MR. GATTO: Judge, it's the State's position pursuant to Rule 16.7 the Arizona Rules of [5] Criminal Procedure and also State vs. Embry (phonetic) that the defendant has the burden of coming forward with a prima facie case when the State's preponderance arises.

THE COURT: Ms. Walters, it's your burden.

TODD EDWARD GREENE,

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. WALTERS:

Q What is your name, please?

A Todd Edward Greene.

Q And where are you employed?

A Pima County Sheriff's Department, traffic unit.

Q How were you employed on September 21, 1993?

A With the Pima County Sheriff's Department as a Rincon patrol deputy.

Q And approximately 0058 hours, where were you on patrol?

A In the area of Craycroft and River Road, which is in Pima County.

[6] Q What were you doing at that location?

A Monitoring traffic moving through the intersection of Craycroft and River Road.

Q Did you come in contact with a Fermin Perez on that date and approximate time?

A Yes, I did.

Q And how did you happen to come in contact with him?

A I was stationary at that intersection, like I said, watching traffic go through that intersection. I heard a vehicle approaching from the south traveling northbound on Craycroft approaching River. I then saw a white sedan approaching River Road, I looked at the intersection stop

lights and noted that all directions were red, east, west, north, south. However, there was a green left turn arrow for eastbound – I'm sorry – westbound River Road for traffic to turn south onto Craycroft. The white sedan proceeded through the intersection without stopping for the red light at what appeared to be a high rate of speed.

I then pulled behind the vehicle, started to accelerate up Craycroft Road. I looked at my speedometer. The speedometer indicated 60 miles-per-hour, then 70, continued all the way up to 90 miles-per-hour and eventually reaching 100 [7] miles-per-hour. I was not at that point losing ground nor gaining ground on the white sedan, I was achieving a common distance and we were approaching Sunrise Drive.

The vehicle placed its brake lights on at Sunrise Drive, the light was green. I had radioed for assistance from a Deputy Nichol to intercept the vehicle as it turned right onto Sunrise Drive. Deputy Nichol was in the area of Kolb and Sunrise, I believe.

At that point, I looked to the right as I approached Sunrise Drive and saw the white sedan with the brake lights on had pulled off of the roadway just to the east of Craycroft. I pulled in behind the vehicle and a male exited the vehicle with his hands over his head and in a surrender position who was later identified as Mr. Perez.

Q Okay. Let me stop you at this point.

When you were following the vehicle, were you using any kind of radar or any kind of device to determine the speed of the vehicle?

A Just my speedometer.

Q And had your speedometer been calibrated by anyone with the sheriff's department?

A Other than myself using radar, no.

Q During your following of the vehicle in [8] front of you, what was the distance? About a mile and-a-half?

A Approximately from River to Sunrise is about a mile and-a-half, I believe.

Q And during that entire time, did you have constant eye contact with the vehicle in front of you?

A Yes, I did, and no vehicles pulled onto Craycroft in between us.

Q Isn't it – would you please describe the terrain in that area from Sunrise down to River and Craycroft?

A Certainly.

Craycroft Road from River Road to Sunrise Road Drive is a two lane road. It is hilly. There are points where the road does become rough. That's really all that's notable about the roadway itself.

Q And in this hilly area, didn't you lose contact – eye contact with the vehicle in front of you during some of the hilly areas?

A I was about seven car lengths behind the vehicle, and to my recollection, at no point did I lose sight of the vehicle's taillights.

Q Did you have a license plate when you first observed the car at the intersection of Craycroft and River?

[9] A No, not at that time.

Q When did you obtain the license plate?

A As I pulled in behind the vehicle when it pulled off the right-hand side of the roadway on Sunrise Drive.

Q When the vehicle stopped, did you have contact with the driver of the vehicle?

A Yes, I did.

Q And who was the driver of that vehicle identified as?

A Fermin Perez.

Q Did you advise Mr. Perez why he had been stopped?

A Yes, I did.

Q And was that because of his speed?

A And running a red light at River and Craycroft.

Q Did Mr. Perez make any statements to you at the time of the stop that he wanted an attorney to be present or request the assistance of an attorney?

A No, not at that time.

Q What did you – after you had contact with him, did you ask him to perform any field sobriety tests?

A After I had determined that a field [10] sobriety test was necessary, yes.

Q Did you advise him that the field sobriety tests were voluntary?

A Yes.

Q And did you advise him of his Miranda rights prior to him performing the field sobriety tests?

A No, I did not.

MR. GATTO: Objection, irrelevant.

THE COURT: Sustained.

Q (By Ms. Walters) Did he request an attorney prior – when you asked him to do the field sobriety tests?

A No, he did not.

Q Did he perform field sobriety tests?

A Yes, he did.

Q During the performance of those tests, did he request an attorney or someone to be present?

A Not during the tests, no.

Q Did you perform the horizontal gaze nystagmus?

A No, I did not.

Q What was your reason for not doing that?

A At that time, I was not certified by the State of Arizona to perform that test.

[11] Q After the field sobriety tests, did you place Mr. Perez under arrest?

A Yes, I did.

Q And what time was the stop of Mr. Perez?

A I believe it was about 0105 after the pursuit.

Q And do you recall what time you placed him under arrest?

A Not without referring to my report.

Q Do you have your report with you?

A It is on the State's table, yes.

MS. WALTERS: May I approach, your Honor?

THE COURT: Sure.

Q (By Ms. Walters) This is your report that you brought with you?

A Yes, it is.

Q Okay. If you need to refer to that to refresh your memory?

A It appears that the subject was placed under arrest at 0125 hours.

Q So that was about twenty minutes after the stop?

A Yes, it was.

Q And at that time, did you read him his Miranda warnings?

[12] A At 0130 hours.

Q Did he understand his Miranda warnings?

A He said, "No."

Q Did he waive his Miranda warnings?

A No, he did not.

Q Did you ask him any further questions after that?

A No, I did not.

Q Did he at any time after or during the reading of the Miranda warnings request an attorney?

A Yes, he did.

Q At what point did he request an attorney?

A After I advised him of his Miranda rights, he said – quote – "I want an attorney right now, Harold Hyams" – unquote – and then he again said – quotes – "I want an attorney before I do any tests right now" – unquote.

Q And then what did you do after he gave you that information?

A I asked him if he would submit to a chemical test of his bodily substance as required by law.

Q When you advised him of that, did you use the implied consent affidavit admin per se?

A Not initially, no.

[13] Q That was what you just advised him in your own words as to what that meant?

A I used the wording, to the best of my recollection, off the admin per se letter.

Q And when did you advise him of – or request him to submit to a chemical test?

A After I placed him under arrest at the scene.

Q So that was approximately 1:30?

A About that, yes, ma'am.

Q And what was his response?

A Blood.

Q And did you take him to the blood test?

A I put him in the vehicle and began to transport him to the hospital. Mr. Perez then said – quotes – "I want an attorney present while I do the test" – unquote.

Q And which hospital were you going to?

A I believe I was going to El Dorado.

Q And how far were you from the El Dorado Hospital?

A About fifteen minutes.

Q And was this approximately 1:30 in the morning, still?

A About that time.

[14] Q And what did you do after Mr. Perez made that statement that he wanted an attorney?

A I told him that he was not permitted to have an attorney present during the testing and he could make a call to an attorney, but an attorney was not – it was not his right to have an attorney present. He insisted that he have an attorney present at the test.

Q And was this during your drive to the hospital?

A Just as I left the scene traveling southbound on Craycroft.

Q And did you go to the hospital?

A No, I did not.

Q And why did you not go to the hospital?

A Because of the wording of Mr. Perez's refusal, I took that as a refusal to admin per se.

Q Prior to you deciding that this was a refusal, what opportunities did you give Mr. Perez to contact an attorney?

A I had no opportunity at the scene to let him contact an attorney.

Q Were you driving by places where there were public phones or phones available?

A There is an ABCO at Craycroft and River.

[15] Q Did you stop there to let him make a phone call?

A No, I did not.

Q Were there telephones at the hospital that you were taking him to?

A Yes, there were.

Q Did you consider taking him to the hospital and giving him an opportunity to call his attorney prior to the blood test?

A No, because of the wording of his refusal.

Q Okay. And so at what point did you read him or go over the implied consent affidavit, admin per se implied consent affidavit?

A At the Pima County Jail in the Pretrial Services area.

Q Do you recall what time that would have been?

A No, I don't. I don't think it's written anywhere in my report.

It takes about fifteen minutes to get to the jail from that scene, so about 0145.

Q When you read him that affidavit, did he make any statements requesting an attorney?

A I have to make reference to this sheet. He did make a statement, but I don't know what it is.

[16] He said – quote – "I want an attorney present right now," and then I noted, it said, "Would not do test without one."

EXAMINATION

BY THE COURT:

Q Was he given an opportunity to call an attorney at the jail?

A He was booked into jail at that point.

Q So that's, "No."

A Jail personnel do allow them one phone call.

Q Did you make arrangements for him to call an attorney at the jail?

A No, I did not.

Q So he was booked in jail and not free to leave; is that correct?

A He was not free to leave when he was placed under arrest.

Q Do you know if he spent time at the jail?

A I believe the procedure is he spent approximately twelve to fourteen hours at the jail until his pretrial or initial appearance at 2:00 p.m. the next day.

Q Did you at any time advise him of his [17] right to an independent blood test?

A No, I didn't.

Q And why did you not do that?

A It has been my training and experience that when a person refuses a chemical test, that the chemical blood test admonishment not be given.

MS. WALTERS: I have nothing further.

THE COURT: Mr. Gatto?

MR. GATTO: Thank you, Judge.

CROSS EXAMINATION

BY MR. GATTO:

Q Deputy Greene, you mentioned during your testimony on direct examination that Mr. Perez's wording was a refusal. Do you recall what that wording was?

A Yes.

Q What did he say?

A He said, "I want an attorney before I do any tests present."

Q In regards to the admin per se form, when was that read to the defendant?

A When he was at the Pretrial Services.

Q Did you read it verbatim?

A Yes, I did.

[18] Q Did the defendant indicate he understood the information you provided to him?

A Yes, he did.

Q In regard to the defendant's request to speak to an attorney, when was that first made?

A After I had placed him under arrest.

Q That was about 1:30 at the scene?

A Yes, sir.

Q When you left the scene, you were on your way to El Dorado Hospital; is that correct?

A Yes, sir.

Q En route, did the defendant say he wanted to do a blood test?

A Yes, sir.

Q Also, he tells you he will not do the test unless he has an attorney present; correct?

A Yes, sir.

Q He also said there should be an independent third party evaluator present?

A He told me he should have had an evaluator present after the field sobriety tests were completed and he was placed under arrest.

Q After the defendant told you that he wanted an attorney present for the test, what did you do?

A I advised him that he wasn't – it's not [19] his right to have an attorney present at the test, but he could call an attorney and talk to one, and he adamantly wanted an attorney present during the test.

Q After that conversation, what did you do?

A I began to transport him to the Pima County Jail.

Q At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?

A Not while I was at Pretrial Services. I honestly don't recall.

Q The arrest in this case took place at 1:25?

A Yes, it did.

Q The rights were read to him at 1:30?

A Yes, they were.

Q Between 1:25 and 1:30, did you ask the defendant any questions?

A Simply what he wanted done with the vehicle.

MR. GATTO: I don't have any further questions.

MS. WALTERS: I just have a few, your Honor.

THE COURT: Okay.

[20] REDIRECT EXAMINATION

BY MS. WALTERS:

Q When he asked – okay. When he asked to have an attorney present and you were on the way to the hospital, would it have delayed your investigation if you would have allowed him to make a phone call to an attorney?

A I can't testify to that. I have no idea. I don't know how long the phone call would have taken, if he would have had an attorney that he wanted to talk to. He said Harold Hyams, a personal injury attorney. I honestly don't know.

Q But you had time, didn't you, to take him to a phone and let him make a phone call. I mean, the time wasn't running out where it was no longer time for taking the blood sample?

A Are you trying to find out if I was pressed for time to get a chemical test of his bodily substance?

Q Well, yeah, that was part of my question.

A I didn't see that as a problem, no.

Q So the time frame wasn't a problem to get the test?

A No.

Q But how about allowing him to make a phone [21] call to try to contact an attorney? Did you have sufficient time for that?

A Again, I don't know. I don't know if that would have delayed it to the point where I would have had to be past that two hour time limit. I have no idea.

Q But it would have taken him five to ten minutes to make a few phone calls?

A He could have stopped and made that determination at that point.

Q You didn't allow him that opportunity; is that correct?

A He wanted an attorney present. I offered him the attorney, to call an attorney, or the opportunity to call an attorney. He wanted an attorney present.

THE COURT: You did ask him if he wanted to make a phone call?

THE WITNESS: Yes, I did.

THE COURT: And at what point did you do that?

THE WITNESS: In the vehicle after he told me that he wanted an attorney present during the chemical testing.

Q (By Ms. Walters) So it's now your [22] testimony that you told him that he could make a phone call?

A I advised him that he was not allowed to have an attorney present during the chemical testing. I then told him he could make a phone call to talk to an attorney, but he did not have the right to have an attorney present.

Q Okay. But that's a change in your testimony. So now you're saying that you told him he could make a phone call?

A I answered that before.

Q And is that in your police report?

A No.

Q It was – did you mention that when we had our interview on August 21, 1996?

A I don't think so.

Q But now all of a sudden, you remember that you gave him or told him he could make a phone call?

A Yes.

Q And did he say, "I'll make a phone call"? Did you give him any opportunity, take him to a phone?

A No. He said, "I want an attorney present."

Q Did he specifically say, "I don't want to make a phone call"?

[23] A No, he didn't.

Q And assuming his attorney could have been there at the hospital and that he was at the hospital in a reasonable period of time and not to delay the proceedings, it would have been possible to have his attorney present; isn't that correct?

A I had been trained that it was not his right to have an attorney present at the point of the chemical test.

Q But he could have had an attorney present when the blood was drawn; is that right?

MR. GATTO: Objection. It's irrelevant.

THE COURT: Sustained.

MS. WALTERS: I have nothing further.

THE COURT: Mr. Gatto, anything further?

MR. GATTO: Just briefly, Judge.

RECROSS EXAMINATION

BY MR. GATTO:

Q Deputy Greene, after you told the defendant after he was stopped he could make a phone call, what was the dialogue from there?

A He told me that he wanted an attorney present at the point of the chemical test and I told him that he doesn't have a right to have an attorney [24] present, and that was the end of the conversation.

MR. GATTO: I have nothing further.

THE COURT: Thank you, Officer. you can step down.

Any other testimony?

MS. WALTERS: No.

THE COURT: Argument?

MS. WALTERS: Yes, your Honor.

I believe that the charges should be dismissed because of the officer's violation of his right to contact an attorney prior to any blood test being drawn.

I think the State cited a case, Kuntsler vs. Superior Court of Pima County (phonetic), in their response, stating that the request to speak to an attorney prior to being

administered a test, that he should be afforded an opportunity to do so when such consultation would not interfere with the investigation or the taking of the test.

There is no testimony that Mr. Perez's request for an attorney would have delayed or caused any problems with the State going ahead with the blood test. He did voluntarily agree to take the blood test. He wanted to consult with an attorney prior to the actual blood draw. There is no evidence that [25] that would have caused any delay on the part of the State to go ahead and get the blood test at the hospital.

There were numerous opportunities for the officer to provide Mr. Perez with the opportunity to call an attorney. There were places nearby, there were public phones, he could have gone to the hospital and allowed him to make a call there. There was sufficient time to make several phone calls, maybe wait a short time for an attorney to call back or even appear at the hospital. Mr. Perez's requests could have easily been complied with.

The State could have taken the blood test, which could ultimately have assisted Mr. Perez in his defense also. However, he was denied this by the officer summarily deciding that that was a refusal, without giving him an opportunity to take any steps to obtain an attorney.

And the recent testimony by Deputy Greene that all of a sudden, you know, after he's given testimony and written reports and given statements to me during a lengthy interview, that's the first time I've ever heard that he said he could make a phone call. I find that unbelievable, your Honor, and I mean the testimony prior to that, when I was asking [26] him questions, was very clear that he did not offer Mr. Perez a phone call at all, that he took it as a

refusal just because he said he wanted an attorney present.

That matter could have been clarified if he would have given Mr. Perez an opportunity just to make a phone call and perhaps consulting with an attorney would have appeased him and he would have gone ahead with a blood test or his attorney could have had sufficient time to meet him at the hospital. We don't know that, but there is sufficient time and sufficient opportunity.

At that point, if there was a delay or he couldn't get in touch with his attorney or continue to refuse, then perhaps it could have been deemed as a valid refusal, but the officer just jumped the gun and reached the opinion that it was a refusal without providing him –

THE COURT: When did you interview the officer?

MS. WALTERS: On August 21.

THE COURT: Did you specifically ask him any question about whether he offered the defendant a phone call?

MS. WALTERS: Well, I could go through [27] this, your Honor.

MR. GATTO: Judge, I would have no objection to allowing the Court to have Ms. Walters submit a copy of the interview for your consideration in this matter.

THE COURT: Well, I don't want to read through the whole interview. If there is a specific answer to that specific question, it might be helpful. I mean, if she didn't

ask it at all, then the officer certainly doesn't have to volunteer it.

MS. WALTERS: I have the places marked that I can look through, but it might take me a moment. you might want to take – I'll look at it when Mr. Getto is doing his argument and see if I asked the particular question.

THE COURT: Okay. Mr. Gatto?

MR. GATTO: Judge, two questions.

No. 1 is the credibility of Deputy Greene's testimony in regards to the phone call. There is no mention in the police report, also in the interview of Ms. Walters.

Beyond that, the question then becomes the wording of the defendant's refusal, "I will not do the blood test unless I have an attorney present." He's not entitled to have an attorney present, he's [28] entitled to consult with an attorney to receive information. However, he cannot unreasonably interfere or delay the State's investigation. Here the defendant's insistence that he have an attorney present is unreasonable and that's supported by law. Deputy Greene said, "You can make a phone call if you want to do it," and the defendant said, "I want to have an attorney present." He is not entitled to that. So the wording in evidence is crucial to the determination of whether or not the Court should feel to dispose of the matters on that issue.

In regards to the independent test filed by Ms. Walters, State vs. North, it said that when we read suspects the admin per se –

THE COURT: That's dependent upon the refusal.

MR. GATTO: Correct, but there is no requirement of informing individuals of the right to an independent test wherein admin per se is read to them.

I'll leave it to the Court's discretion. The evidence is in as far as the deputy testified that he gave the defendant an opportunity to make a phone call in that he explained to him, "We will let you make a phone call." The defendant's insistence of having an [29] attorney present for it, which he is not entitled to. constituted a refusal and a waiver of his right to contact an attorney.

MS. WALTERS: Well, your Honor, I still am reviewing it, but on page 40, when I'm asking him, I asked him, "And what opportunity did you provide him to contact this attorney," and he replied, "Well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, "I want an attorney before I take any tests of my blood.'" So I asked him specifically, "What opportunity did you provide him to contact an attorney," and he didn't make any statement that he said he gave him an opportunity to make a phone call.

THE COURT: Did you ask the officer at all about a telephone call anywhere in the –

MS. WALTERS: Well, I know I asked him if he was given an opportunity to make calls, and, you know, besides that, he said that he didn't really completely read him the admin per se affidavit until after he deemed it to be a refusal when he got to the jail, so I don't know how that can be deemed to be a valid waiver if he wasn't even fully advised of the implications on that.

THE COURT: Well, presumably, at Pretrial [30] Services, he could have said, "Okay, I'll take a blood test."

Actually, isn't it the officer's discretion which test to give him?

MS. WALTERS: Excuse me?

THE COURT: Isn't it at the officers's discretion which test is given, so at Pretrial Services he could have said, "Okay, I'll take a test," they could have given him the breath test.

MS. WALTERS: Well, I think he gave him the opportunity.

But let's see. This is after he read him the – formally went through the admin per se, and then I asked him what opportunity – okay. They were at the jail –

MR. GATTO: Page, please?

MS. WALTERS: 44. Excuse me.

– at the jail, and I asked him, "Did you go – A, formally go through the admin per se and implied consent affidavit?" "No."

"And then what opportunity did you give him to contact his attorney when he was at Pretrial Services?" "I told him, 'You're more than welcome to use the phone here if the Pretrial Services people will let you make a phone call.'" And that's the first time [31] that he's ever mentioned giving him an opportunity to make a phone call.

"And did you specifically provide him with a phone, he – you just left that up to Pretrial Services?" "That's correct."

His request to make a phone call. "Did you provide him with a phone book or anything like that?" "No."

And then I went through the same questions I asked today, "Would you offer him an opportunity to call the different places," and he said, "No," and never once until now did he state that he told him he could make a phone call.

MR. GATTO: Judge, may I offer another portion of Ms. Walters' interview transcript? I understand the Court's reluctance in not wanting to read the entire transcript, but also on page 41, this is continuing from the first statement Ms. Walters was making with regards to the defendant's request for an attorney, it continues on, and on line 6, page 41 of the interview, it's an answer now, it says – it says –

MS. WALTERS: What page?

MR. GATTO: 41.

MR. GATTO: "– comma, and after that – [32] and that was after previously agreeing to take a blood test, so I explained to Mr. Perez that his license would be automatically suspended for twelve months if he refused to test at this point and he said he wasn't going to take a test without an attorney present."

And, Judge, I submit that for your consideration of Deputy Greene's credibility on the stand in that his testimony today does not differ significantly from the interview transcript of Ms. Walters.

Additionally, the information she provided from reading from page 44 wherein they are at Pretrial Services, he says there is a phone now, there is no violation there.

THE COURT: All right. The motion to dismiss regarding independent blood test is denied.

Motion to dismiss regarding probable cause denied.

Motion to dismiss per Rule 8 denied.

Ms. Click's recitation of the excluded time in Justice Court seems to be appropriate.

Motion to suppress statements or motion to dismiss regarding denial of counsel denied.

You want me to go through the Motion in Limine that you filed?

[33] Is this set for change of plea next week?

MS. WALTERS: Well, it's set on the 4th for change of plea and a trial on the 5th, and I've just interviewed the custodian of records and I just gave Mr. Gatto a letter to take to Ms. Click. The issue on doing anything different with the plea and perhaps after the motion hearings, then my client – I did give him a copy of the officer interview. I'm not sure if it will be a change of plea, but there is a possibility.

The Motion in Limine is just very – we can do that before trial.

THE COURT: All right. The Motion in Limine will be at the time of trial, Motion in Limine, refusal of D.U.I. intoxilyzer.

I think, really, the issue of refusal with an appropriate jury instruction ought to take care of the refusal issue.

MS. WALTERS: Okay.

THE COURT: So Motion in Limine regarding refusal of D.U.I. intoxilyzer is denied. I think what you do is you let the jury decide whether it was a refusal or not.

Okay. I think that covers all the motions.

And you have a change of plea set for [34] September 4?

MS. WALTERS: Right.

THE COURT: Okay. Thank you.

MS. WALTERS: Thank you.

MR. GATTO: Thank you, Judge.

(Court was adjourned at 10:40 a.m.)

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CERTIFICATE

I, Van G. Honeman, do hereby certify that as an Official Court Reporter for the Pima County Superior Court, I reported the foregoing proceedings to the best of my skill and ability; and that the same was transcribed under my supervision via computer-aided transcription; and that the foregoing pages of typewritten matter are a true, correct and complete transcript of all the proceedings had as set forth in the title page hereto.

/s/ Van G. Honeman
VAN G. HONEMAN, RDR
Official Court Reporter
Pima County Superior Court
Tucson, Arizona